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relegation of important questions of high principle to the judiciary tends to degrade democratic deliberations by removing important matters from legislative and popular discussion and consideration. n3 This is the well known countermajoritarian objection to binding judicial review and points to several distinct problems: the possibility of judicial bias; the risk that judges may bar needed experimentation; and judicial interference with quality democratic deliberations.

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n1. By "binding" I mean a judicial decision on constitutionality that is final and binding on the legislature, rather than one that sends a statute back to the legislature for reconsideration in light of a possible constitutional problem. I follow Calabresi's topology in large part. Guido Calabresi, The Supreme Court 1990 Term-Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores), 105 Harv. L. Rev. 80, 82-83 (1991). As noted below, see infra notes 9-10 and accompanying text, I combine his Types I and II into "binding judicial review" and refer to Type III as "limited judicial review."

n2. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962); James B. Thayer, John Marshall (1901); Thomas C. Grey, Eros, Civilization and the Burger Court, 43 Law & Contemp. Probs. 83 (1980); Mark Tushnet, "... And Only Wealth Will Buy You Justice"-Some Notes on the Supreme Court, 1972 Term, 1974 Wisc. L. Rev. 177; Henry Steele Commager, Majority Rule and Minority Rights (1943) .

n3. See Thayer, supra note 2; Bickel, supra note 2; Paul Brest, Who Decides?, 58 S. Cal. L. Rev. 661 (1985).

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Many legal scholars offer justifications for binding judicial review to overcome this objection. Two kinds of arguments are advanced. A number of theorists argue that judicial review is de [*976] sirable because judges have the capacity, leisure, and political insulation necessary to make better, more principled, decisions than the majority, protecting minorities from the tyranny of the majority. n4 Others argue that there is no real tension because judicial review either is democratic-democratic processes ratified the Constitution n5-or can and should be interpreted to further democracy by ensuring that all citizens can participate politically, for example, by being able to engage in political speech. n6

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n4. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); see also Bickel, supra note 2; Ronald Dworkin, A Matter of Principle 33-71 (1985).

n5. Bruce Ackerman, We The People: Foundations (1991).

n6. Martin Shapiro, Freedom of Speech: The Supreme Court and Judicial Review 32 (1966).

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The arguments supporting binding judicial review in a democracy remain uneasy, particularly in an era in which everyone seems to agree that judges inevitably decide open issues-and many constitutional cases raise such issues-in light of their experiences, interests, perceptions, needs, and biases. n7 Judicial decisions may seem more "principled" than legislative decisions to others like themselves-mostly elite white male scholars writing on these issues-but may nevertheless reflect the interests and needs of their class, race, and sex at the expense of the needs and interests of other, more numerous groups. n8

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n7. Brest, supra note 3; Michael J. Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. Cal. L. Rev. 551 (1985).

n8. Brest, supra note 3; Tushnet, supra note 2.

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In this literature on the problems with, and justifications for, binding judicial review in a democracy, one might expect the relatively obvious and unique problem of women to play at least a significant role. Women are, after all, a majority group excluded from the process that produced the Constitution, the Bill of Rights, and binding judicial review. Women have been excluded from the judiciary throughout most of our history, and the judiciary operates within a system of precedent. Even were women present today in the judiciary at appropriate levels, they would be bound by precedent developed by men.

In this essay, I focus on the uneasy case for binding judicial review from the perspective of women: a majority group that has never achieved its share of democratic or judicial power. From the perspective of women, each of the traditional objections to binding judicial review gains additional strength. I also discuss an additional objection to binding judicial review from the perspective of women: futility. Judicial decisions have the ability to sap the strength of [*977] political movements while lacking the ability to ensure much in the way of meaningful social change.

In considering whether binding judicial review is conservative, that is, likely to contribute to the subordination of women, it is critically important to look at a concrete issue of manageable size. Analysis that covers broad areas or that is abstract may miss important problems or suggest ambiguities that disappear when one looks at a small area in the real world. I therefore spend some time looking at the way in which judicial review of regulation of speech by public universities has operated. This is, I believe, an ideal area to consider for three reasons. First, it is an area in which all action is state action, so that the public-private distinction-which tends to keep matters important for women beyond the scope of judicial review-does not suggest a neutral reason where there actually is none. Second, as an academic, I know how academic institutions operate. I have been on the faculty of one for eleven years. This is important, because in assessing the effect of binding judicial review in any particular institutional setting, one might miss key points if one fails to understand how the institution actually operates. Third, this is a manageable

area, narrow enough to be able to come to firm conclusions.

Examination of judicial review of public university speech regulation confirms my suspicion that binding judicial review is a problem for women. Although everything important a university does regulates speech, judges are only able to see regulation when public universities adopt speech codes protecting racial minorities, lesbians, gay men, and women. Federal judges are unable to see regulation of speech when traditional practices and policies, such as the accepted meaning of rigorous scholarship or the current parameters of various disciplines, impede the access of newcomers to university communities.

My suspicion-that judicial review may increasingly pose a problem for women-applies to binding judicial review, that is, judicial review that binds the legislature and limits absolutely the options available to it. n9 If my suspicion is right, perhaps judicial review should be limited. If a court thinks that the legislature has not sufficiently considered a serious constitutional problem, the court might strike the statute for the time being, but allow it to [*978] stand if the legislature enacts it again after serious consideration. n10

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n9. I use "binding judicial review" to refer to Calabresi's Type I and Type II cases involving fundamental rights and suspect classes. Calabresi, supra note 1. As he notes id. at 103, the review is the same in both groups.

n10. Calabresi, supra note 1.

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There are, of course, other western democracies without binding judicial review. It is not a necessary prerequisite for a free or liberal society. England has no written constitution and hence no binding judicial review. France and Sweden have nothing we would recognize as binding judicial review, though they do have written constitutions. In Sweden, review is limited to obvious and apparent conflicts between proposed legislation and the Constitution, and Swedish judges are reluctant to jump into the political fray. There have been "only a few unimportant instances of judicial review in Sweden" under the 1974 Constitution. n11 The French Constitutional Council has only a very limited form of judicial review. Legislation cannot be constitutionally challenged after passage or as applied to a particular situation. Nor can a citizen request judicial review. Only certain government officials and office holders can, prior to passage, request review of the constitutionality of the legislation in the abstract; not as applied. Political scientists see the French Constitutional Court as more a legislative entity than a judicial one. n12

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n11. Nils Stjernquist, Judicial Review and the Rule of Law: Comparing the United States and Sweden, in Comparative Judicial Review and Public Policy 129, 138 (Donald W. Jackson & C. Neal Tate eds., 1992).

n12. Alec Stone, Abstract Constitutional Review and Policy Making in Western Europe, in Comparative Judicial Review and Public Policy 41, 47 (Donald W. Jackson & C. Neal Tate eds., 1992); Alec Stone, The Birth of Judicial Politics

in France: The Constitutional Council in Comparative Perspective 8-10 (1992).

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On one level, this article is a broad attack on binding federal judicial review, but it does have three more modest applications. First, I argue against the extension of binding judicial review to public-university regulation of speech, an area as yet without a Supreme Court case. Second, my criticisms of binding judicial review in speech and sex-equality cases could be turned into arguments for certain substantive holdings over others in a world with some binding judicial review. Judges, for example, should be more tolerant of viewpoint-restrictions which help groups who have less than their share of political power, particularly when those groups were excluded from the Constitution-making process. In contrast, judges should be most tolerant of viewpoint restrictions which limit the speech of groups with more than their share of political power, particularly when such groups dominated the Constitution-making process. And judges should defer to sex-based legislative classifications that protect women fulfilling traditional roles, even if such protection inevitably reinforces traditional stereotypes. Given the [*979] ubiquitous problem of judicial bias, experimentation with such approaches may be necessary if we are ever to see equality between the sexes.

Third, I would like to start a discussion within the feminist community about the extent to which we should continue to focus on the Supreme Court and binding judicial review. Should we not shift our energies to the legislative arena (as we have increasingly done of late) and perhaps even encourage the Supreme Court to uphold legislative classifications based on sex and protective of women in traditional roles in appropriate cases, such as custody at divorce? n13

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n13. See Mary E. Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. Cal. Rev. L. & Women's Stud. 133 (1992).

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I am fortunate to write from the perspective of a second-generation legal academic within the contemporary women's movement. Members of the first generation assumed, understandably I think, that in seeking equality, women should follow the approach taken by the NAACP and ask judges to ban sex-based distinctions: discrimination consists of legislative classifications treating similarly situated women and men differently. n14 Such arguments were, it must be noted, only partially successful. For example, the Supreme Court refused to rule that the military could not distinguish between the sexes. n15 And it also rejected feminists' arguments that discrimination on the basis of sex should include pregnancy discrimination and discrimination in favor of veterans (at least when such discrimination had the effect of making higher positions in state government an almost exclusively male preserve) . n16

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n14. Orr v. Orr, 440 U.S. 286 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Reed v. Reed, 404 U.S. 71 (1971).

n15. See infra text accompanying note 120.

n16. See infra text accompanying notes 118-19.

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Second generation feminists see an additional problem with this formal-equality approach: even when successful, it only helps those women who are most like men. Women fulfilling traditional roles are often hurt by it, because traditional protections are likely to fall. n17 And even if not worse off under this approach, women in ordinary roles in ordinary homes and businesses are unprotected. What women need is different from what men need, and hence unaddressed by an equality approach focused on what men have.

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n17. See infra text accompanying notes 122-25.

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As Catharine MacKinnon noted in the late seventies, the Supreme Court's approach misses the mark on inequality between the [*980] sexes. The key problem is not that women who are identical to men are treated differently. Rather, it is that differences between the sexes (and women are as different from men as men from women) are repeatedly and systematically turned into advantages for men and disadvantages for women, so that men end up on the top of the sexual hierarchy and women at the bottom. n18

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n18. See Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 116-27 (1979).

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Real equality between the sexes will require much more than just treating women-who look and walk and talk like men-like men. It will require, to be sure, more flexibility in sex roles; all else being equal, it is desirable to treat people as individuals rather than assuming that all women act one way or have one set of needs and all men act another way or have a different set of needs. But it will also be necessary to increase women's power and share of the good things of life, reducing women's pain and increasing women's pleasure. We need, for example, a consent standard for rape that recognizes and respects women as sexual agents, so that no means no. n19 We need better social security protection for women, and better rules at divorce with respect to financial obligations. We need custody rules that protect women's relationships with their children, crafted in light of widespread judicial bias in judging mothers relative to fathers. Some of these needed changes might even require experimentation with sex-specific legislation. n20 And many changes will require arguments more easily put to legislative bodies, arguments difficult to formulate in terms of the constitutional equality standard. n21

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n19. See Susan Estrich, Real Rape (1987).

n20. See Becker, supra note 13.

n21. See infra note 91 and accompanying text.

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In my discussion, I deliberately mix several theoretically distinct problems: (1) binding judicial review by an elite mostly-male minority in a democracy in which women, a majority group, are subordinate; (2) binding judicial review of issues arising under our Constitution, one which does a far better job of meeting the needs of elite propertied men than of other groups; n22 and (3) the exclusion [*981] of women, a majority group, from the process that produced our Constitution, our Bill of Rights, and binding judicial review thereof. These problems are likely inter-related rather than independent, and the case against binding judicial review becomes strongest when one considers them together.

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n22. See Mary E. Becker, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. Chi. L. Rev. 453 (1992) (freedom of religion in many ways secures superior rights to men; free speech guarantees wealthy men access to mass media, which silences women through exclusion and the promotion of violence; the right to bear arms allows men to form military organizations in which women may not bear arms-like the state militias and the national armed services; the Fourth Amendment protects men's physical security at home from the government, but neither the Fourth Amendment, nor criminal law adequately protects women from the largest threat to their safety at home: domestic violence; the right to property protects those who own property (more often men) and ignores traditional women's work, which is less likely to produce property).

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I do not mean to suggest that all forms of constitutionalism (all higher laws) are bad for women nor that all forms of judicial review (even under our Constitution) are equally troubling from the perspective of women. For example, the case for judicial review of denial of the vote to citizens seems a good thing, even under our flawed Constitution. n23 And, in general, both constitutionalizing and providing judicial review of questions of governmental structure, organization, and power might be desirable, such as whether the government will consist of separate branches or have a parliamentary form. But even these aspects of our Constitution have a questionable pedigree, given the exclusion of women from decisions about basic structure. Women might be better off with a parliamentary system, since parliamentary governments are generally better at acting than divided government, and women need action. Women might also be better off with proportionate representation with party lists-comparative evidence suggests that women do better under such electoral schemes n24-rather than our system of divided government and one-"man" districts for most elected offices.

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n23. See infra note 180 and accompanying text.

n24. Janet Clark, Getting There: Women in Political Office, 515 Annals Am. Pol. Sci. Soc'y 63, 74-75 (Janet K. Boles ed., 1991).

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My focus in this article is not these larger structural problems, but rather the special problems of binding judicial review for sex discrimination and fundamental rights such as speech and abortion, the areas that seem most relevant to the status of women. Had we a different higher law-one that women had a full voice in shaping and that.was interpreted by a precedent-bound body only after women were a majority of members of that body-I would not raise these objections to binding judicial review (though I might, of course, have others).

Given the troubling problems with our higher law-such as its ability to protect best the interests of those most like that small, exclusionary, propertied group of white men, the founding fathers-even nonbinding judicial review might be illegitimate. It might yet [*982] give too much weight to those rights, such as the right to "property," enshrined in the Constitution. Much would depend, however, on how nonbinding review "works" in practice; whether it would entrench the vested interests that formed the Constitution or whether it could be part of a system that increasingly offered the previously excluded fuller participation.

No constitutional moment will, of course, ever be perfectly inclusive, allowing all an equal ability to participate and be heard. This might seem to suggest that any higher law should be regarded as suspect and probably illegitimate. I do not know; this is not the issue I am interested in exploring. I focus on a practice, binding judicial review, that emerged from a document and a process controlled entirely by a minority group-white propertied men-and having the effect today of contributing to the political ineffectiveness of a majority group: women. It may be that other higher laws, with better pedigrees and better substantive provisions, are able to contribute to, rather than retard, full political participation.

I speak only to the legitimacy of binding judicial review at the federal level in the American experience. Even "binding" judicial review at the state level would be a quite different, and much more complex, question. And binding judicial review under a different constitution (especially one adopted after universal suffrage) and within a different political culture (perhaps one with a greater stress on communitarian needs and a lesser stress on rugged individualism) would be a different kettle of fish altogether. n25

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n25. For example, binding judicial review under the Canadian Constitution, adopted in 1982, has yielded results quite different from those we see in the United States. See, e.g., Kathleen E. Mahoney, The Constitutional Law of Equality in Canada, 44 Me. L. Rev. 230 (1992).

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My discussion focuses on women, not racial minorities or other outsider groups. There are a number of reasons why binding judicial review may be much

more problematic for women than for racial minorities. Of all these groups, only women are a majority of the population, so that democratic processes might have more upside potential for women than other nondominant groups.

Another difference is that women never faced the equivalent of Jim Crow legislation. Prior to the Supreme Court's development of equal protection caselaw for racial classifications, all race-specific legislation, like that at issue in Brown, n26 was designed to and had the effect of subordinating members of minority races. With sex, that is not true. Some traditional statutory distinctions between the [*983] sexes-such as the maternal preference for children of tender years in divorce custody cases-reflected existing social patterns and, given those social patterns, protected women's interests. In some senses, such legislation was (especially when compared to some alternatives) beneficial in a way without analogy in traditional race-specific legislation, though admittedly tending to perpetuate traditional sex roles.

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n26. Brown v. Board of Educ., 347 U.S. 483 (1954).

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A third difference is that women and men are more likely to live intimately with each other than are people of different races. As a result, individual women and men may have a greater need to deny that women continue to face problems in their homes and in the broader society. Judges, insulated from political and popular pressure, may be too likely to decide open constitutional cases in a manner consistent with the need to deny the continuing reality of inequality between the sexes.

A fourth difference has to do with the need to maintain sexual difference. We are deeply committed to maintaining difference between the sexes, no matter how artificial. For example, a woman and man must dress and adorn themselves differently to appear professional. A man wearing a suit with a skirt, large earrings, a moderate amount of carefully-applied make up, beautifully coiffed hair, and two-inch heels could not appear professional, though this is "the" look for a professional woman. In contrast, we expect racial minorities to assimilate to dominant white standards of professional dress in the workplace. Judges, insulated from popular and political pressure, may be too likely to see sexual difference (which we work so hard to maintain artificially) as present and relevant (and as justifying inequality).

A fifth difference is that women may tend, more than minorities, to see their problems as personal rather than political. Women often deny their problems as personal problems, convincing others and even themselves, that their lives are fine. Anything tending to dampen women's political struggles may therefore be particularly dangerous.

A final difference is pragmatic. We might be able to imagine a world in which the races are equal. We cannot imagine a world in which the sexes are equal. Without a fair amount of experimentation, how can we know what is likely to foster sexual equality or what it might look like? In our federal system, the fifty states might make ideal laboratories for the kind of experimentation we may need, but the Supreme Court has outlawed important experiments, such as sex-based custody rules at divorce. It may be that more [*984] than one

approach to sexual equality is possible, though not all would be consistent with Supreme Court decisions. Why should the Court be able to close off certain forms of equality just because it has adopted one particular approach? For this pragmatic reason, judicial review may be more of a problem in the context of sex.

On the other hand, it may be that racial minorities might also be better off without binding judicial review. Binding judicial review of fundamental rights, such as speech, is likely to hurt minorities as well as women as it develops into a conservative right. n27 And, just as many feminists have been critical of the Court's approach to sexual inequality under the Fourteenth Amendment, many critical race scholars have been critical of the Court's decisions prohibiting racial classifications, as accomplishing too little while legitimating the status quo as "equality," thus weakening the political struggle for real social equality. n28 Perhaps the Supreme Court's conservative approach to racial equality is becoming a barrier to further progress in a world without Jim Crow. n29 The Court certainly seems eager to deny continuing problems in the relationship between the races as well as that between the sexes.

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n27. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Frederick Schauer, The Political Incidence of the Free Speech Principle, 64 U. Colo. L. Rev. 935 (1993); J.M. Balkin, Some Realism About Pluralism, 1990 Duke L.J. 375. For articles critical of free speech from the perspective of racial minorities, see, e.g., Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 Cornell L. Rev. 1258 (1992); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431.

Derrick Bell makes similar points, but is also critical of political processes. Compare, e.g., chapter 2 (suggesting inadequacy of judicial approach to racial inequality) with chapter 7 (suggesting that legislatures have little interest in remedying problems seen as African-American problems, though they would be willing to spend much to remedy similar problems in the white population) in Derrick Bell, And We Are Not Saved: The Elusive Quest For Racial Justice (1979). See also Derreck Bell, Faces at the Bottom of the Well (1992). Bell might agree, however, that (even racist) political processes would be likely to be better for African Americans in the long run than looking to the Supreme Court for racial equality. Despite his criticisms of legislatures as well as the Court, a theme throughout his books is that the civil rights movement erred in looking to the Supreme Court for real change.

n28. Louis Michael Seidman, Brown and Miranda, 80 Cal. L. Rev. 673 (1992).

n29. See David Strauss, State Action After the Civil Rights Era (draft) (on file with author).

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Finally, when judges imagine a world in which the races are equal, they seem to imagine one in which racial differences have disappeared, one in which other races have been assimilated into white culture. But true racial equality might be more complicated-and getting there might be impossible under race-blind

rules. n30 More [*985] than one kind of racial equality might be possible, though the Supreme Court's approach to racial classifications might eliminate (or make more difficult) consideration of (or experimentation with) some forms of racial equality for no good reason. Like women, who must form coalitions across divisions of class and race to be effective as a majority group, racial minorities can form coalitions that can yield even majority numbers (relative to white men). And binding judicial review can block effective remedies when racial minorities do attain political power. n31

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n30. See, e.g., Kimberle W. Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988); Strauss, supra note 29.

n31. See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking minority set-aside program adopted by a municipality).

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I advance several suspicions, all of which are tentative. One cannot "prove" that binding judicial review is bad for women anymore than one can "prove" that it is compatible with a democracy and serves the common good. I only hope to convince readers of two modest points. First, that in thinking about binding judicial review and democratic legitimacy, one must consider women. Second, that the uneasy case for binding judicial review becomes even uneasier when one does.

Implicit in my analysis is the assertion that women and men do not always have identical interests and concerns. Indeed, their legal interests often conflict. For example, women and men have conflicting interests with respect to the division and enforcement of property and support obligations and child custody awards at divorce. Women and men have conflicting interests with respect to the consent standard in rape. Women and men have conflicting interests with respect to changes in the division of labor within households and the provision of many of the positive economic rights important to women as mothers and primary caretakers of children. Women and men (especially white men) have different and sometimes conflicting interests with respect to the regulation of speech, particularly pornography and hate speech. I do not, in this article, provide a sustained proof of these conflicts. But it is often hard to admit such conflicts, and I fear that the reader may bog down on this point. Assume that I might be right in suggesting such conflicts exist. If I am, how strong is the case for binding judicial review from the perspective of women?

I have structured my discussion in three sections. In section I, I discuss the three traditional objections to binding judicial review, [*986] described briefly in the opening paragraph of this article, n32 together with the problem of futility, also described briefly above: n33 the judiciary is not institutionally capable of ensuring comprehensive social change.

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n32. See supra text accompanying notes 1-3.

n33. See supra text accompanying notes 8-9.

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In section II, I consider the two main justifications advanced by various scholars to overcome the countermajoritarian objection to judicial review: that judges are more principled decisionmakers than legislatures or executives and that judicial review serves democratic purposes. I conclude that we cannot complacently assume that judicial review protects either democracy or principled decisionmaking. More likely, it simply protects the status quo.

In section III, I look in detail at a concrete example of the conservative nature of judicial review from the perspective of women: federal judicial review of public university regulation of speech. I conclude that judges should not exercise binding judicial review in speech-code cases because judges do not review many similar regulations of speech in university communities, particularly those likely to harm women and minorities as new entrants. I am not advocating that public universities ban broadly racist or sexist speech on the ground that universities broadly regulate speech in other ways. Nor am I describing or addressing in any way the parameters of appropriate university speech codes. Rather, I am arguing that the proper parameters should be determined by universities, without binding judicial review, just as courts allow public universities to make decisions about tenure, hiring, course offerings, syllabi, book selections, grades, and class discussions without such review.

I. The Case Against Judicial Review

In our democracy, the legislative and executive branches consist of, or are controlled by, people who are elected and accountable for their actions to the voters. Indeed, the legitimacy of our government is understood as based thereon. Yet federal judges limit the ability of the majority to govern. Federal judges are not elected, but appointed for life by the President with the advice and consent of the Senate. Their interpretations of the Constitution are final and binding on the other branches of government. Thus, a politically-insulated group often sets final and binding limits on what the other branches of government-and ultimately, "we the people"-can do. In so doing, binding judicial review degrades democratic [*987] deliberations. This is the heart of the countermajoritarian objection. In this section, I discuss four major problems implicit or explicit in the countermajoritarian objection. This is done with a focus on women, a majority but subordinated group.

A. Judicial Bias

Several commentators have noted that one objection to binding judicial review is the problem of judicial bias. Federal judges are members of a small elite professional class and are overwhelmingly white men. They are likely to decide open cases in light of their own experiences, perceptions, needs, and interests and those of other members of their class. n34 Calabresi regards this problem as a reason to afford binding judicial review only where there is a broad social consensus on the relevant normative vision. n35 Brest sees systemic judicial bias in favor of issues and values important to their class and profession and a "striking insensitivity and indifference to the poor." n36 Michelman notes that this is equivalent to giving these citizens extra helpings of the franchise. n37

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n34. For a discussion of class bias in the 1972 Supreme Court term, see Tushnet, supra note 2, at 180 ("My argument, in brief, is this: a majority of the Court was willing to invoke the equal protection clause to invalidate legislation that might harm its friends and neighbors but unwilling to strike down legislation that harmed only the poor."). For other discussions of judicial bias, see Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682 (1991); Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges, 61 S. Cal. L. Rev. 1877 (1988).

n35. Calabresi, supra note 1.

n36. Brest, supra note 3, at 667, 664-70.

n37. Frank I. Michelman, On Regulating Practices with Theories Drawn From Them: A case of Justice as Fairness (forthcoming article) (on file with author).

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Although commentators occasionally mention that most federal judges are elite white men, n38 none explores the possibility of resulting sex bias in any depth. Federal judicial review rests ultimate authority in the hands of the nine justices of the Supreme Court. Of the 110 justices who have served or serve on the court today, 109 out of 110 (or 99.090909%) have been men. n39 Only one of nine (11%) is now a woman. Furthermore, even if five were now women (reflecting women's majority status), deference to precedent would give an overwhelming edge to the men for a considerable time to come.

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n38. See, e.g., Brest, supra note 3, at 664 (although underrepresentation of women is mentioned at 664 and 669, the discussion concerns evidence of class and professional bias); Ely, supra note 4, at 58-59 (discussing class and professional bias).

n39. Geoffrey Stone et al., Constitutional Law lxxvi-lxxxiii (2d ed. 1991). This count does not include Ruth Bader Ginsburg, whose nomination was announced after this article was in press.

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There are a number of ways in which judicial bias can be a problem for women. One obvious way is that the all-male Supreme [*988] Court which developed the discretionary intermediate standard for sex equality cases in the 1970s had an incentive to pick an approach that would maximize men's interests (in breaking rigid sex roles that sometimes hurt men n40) without requiring significant change in relationships between the sexes, since real change would often be detrimental to men. The current constitutional standard does, I believe, reflect and serve these needs and ends. n41

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n40. For examples of the many cases won by men in the 70s, see, e.g., Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanley v. Illinois, 405 U.S.

645 (1972).

n41. See infra text accompanying notes 117-36.

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Judicial bias is often a very subtle, not easily perceived, problem. It need not be that judges hate women or even believe unconsciously that men are innately superior human beings to women. Bias will occur when judges look at the world from a perspective held by men more than women. The result of even so-subtle a bias will be legal rules better adapted to the needs of men than those of women. Consider, for example, the pregnancy discrimination cases in the 1970s, in which the Supreme Court (all men) held that sex discrimination (for both constitutional and Title VII purposes) does not include pregnancy discrimination: such discrimination is discrimination between pregnant and non pregnant persons rather than discrimination on the basis of sex. n42 Or consider custody standards which give no weight to the work done only or primarily by women: pregnancy, childbirth, nursing, and emotional caretaking. n43

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n42. See, e.g., Geduldig v. Aiello, 417 U.S. 484 (1974).

n43. See Becker, supra note 13.

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An even more subtle form of judicial bias is the Court's primary commitment to its own legitimacy (or to the perception of its legitimacy). The Court's concern for its own legitimacy n44 naturally results in decisions based on its own needs rather than on a commitment to equality between the sexes. I am fairly certain, for example, that the Court would be loath to require women to be treated exactly like men for all military purposes, including draft and combat, n45 because its action would be seen as illegitimate by many Americans (though the Court's own approach to sex equality would seem to require such a result). Yet women can never be men's political equals while denied full military participation. n46

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n44. For a discussion, see Justice Souter's discussion in Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2808-16 (1992).

n45. See Rostker v. Goldberg, 453 U.S. 57 (1981) (Court unwilling even to require women to register for the draft).

n46. See Becker, supra note 22, at 494-501.

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Given judicial interests conflicting with women's, it is not surprising that, in considering claims other than sex-discrimination, such as free speech or religion, the Justices have narrowed their consideration of what is relevant, excluding harms to women n47 rather than balancing the First Amendment's

requirement of free speech against the Fourteenth Amendment's commitment to equality. n48 In this fashion, negative rights that on their face have nothing to do with gender can serve to perpetuate the second class status of a majority of the population even if a commitment to equality between the sexes supposedly exists elsewhere in the Constitution. As Fred Schauer has noted elsewhere, those most likely to regard the harms caused by pornography and hate speech as the price of a free society "are not the ones that pay very much of the price." n49 Indeed, as other commentators have noted, the commitment to free speech generally reflects the bias of judges who, as members of a professional elite with an unusually high commitment to civil liberties, have a greater commitment to free speech in questionable contexts than does the population as a whole. n50

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n47. American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Penelope Steator, Judicial Indifference to Pornography's Harm: American Booksellers v. Hudnut, 17 Golden Gate U. L. Rev. 297 (1987).

n48. See, e.g., Akhil Reed Amar, Comment: The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124 (1992); Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); see also Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131 (1991) (arguing that core or speech clause of First Amendment was to protect the popular majority (that would be women today) from a self-interested Congress); Mary Ellen Gale, Reimagining the First Amendment: Racist Speech and Equal Liberty, 65 St. John's L. Rev. 119 (1991).

n49. Frederick Schauer, Uncoupling Free Speech, 92 Colum. L. Rev. 1321, 1355 (1992).

n50. See Brest, supra note 3, at 664-67.

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Although legislators are mostly male and many are no less biased than judges, they are subject to direct pressure from female constituents and do not operate within a system bounded by precedent. As women's political power continues to grow, this difference may become more important. Binding judicial review insulates decisions harmful to women-the commitment to formal equality, the refusal to consider harms to women in assessing free speech claims, the perception that sex discrimination and pregnancy discrimination are different things-from correction through women's participation in and pressure on the legislative process, where women can exercise significant power in light of their majority status. For example, the Title VII pregnancy discrimination case was overruled by Congress (so that sex discrimination in employment includes discrimination [*990] on the basis of pregnancy), n51 though the Supreme Court recently affirmed the constitutional case. n52 As this example also suggests, a top-down judicially-enforced approach to equality may also be inconsistent with the kind of experimentation necessary if we are ever to figure out either what equality between the sexes might look like or how to get there.

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n51. 42 U.S.C. 2000e(k) (1988).

n52. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

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B. Experimentation

In a 1931 dissent to a Supreme Court decision striking state regulation of the making and selling of ice, n53 Justice Brandeis noted that there was no longer any consensus that unregulated markets best serve the economic needs of the people. Further, as the country faced its most serious depression, the Court could not legitimately rule out experimentation:

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n53. New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1931) (objection to majority's decision to strike state regulation of business of making and selling ice).

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To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold. n54

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n54. Id. at 311; Traux v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J. dissenting); Robert M. Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, Wm. & Mary L. Rev. 639, 673 (1980-81); Henry J. Friendly, Federalism: A Foreword, 86 Yale L.J. 1019 (1977).

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A pragmatist, like myself, considers it unlikely that human beings can divine the best solutions to complex issues in the abstract, using top-down theories, rather than through experimentation. A related problem is that not all approaches work as judicial standards. If the best approaches do not work as judicial standards, then [*991] binding judicial review will preclude them. I expand on both these points in the discussion that follows.

The need for experimentation is particularly high in an area like equality between the sexes in which there is no consensus about what a world with sexual equality would look like let alone agreement on the means to get there. When

the Court closes off certain approaches as unconstitutional, it may make exceedingly difficult or preclude the development of appropriate solutions. Thus, for example, it may be that some sex-specific classifications are appropriate in family law matters for a number of reasons, particularly in the short term. n55 There might also be more than one form of equality between the sexes, and the differences between various forms might be important. The Supreme Court, by taking the only approach it could apparently imagine in the 1970s, may rule out of bounds certain forms of equality superior to the one it picked. Perhaps also, different approaches may be appropriate at various times as well as in various contexts. Perhaps we need "complex mixtures of approaches," and "fresh mixtures of methods" at various times. n56 A decentralized approach would allow experimentation to see what sorts of rules work best, and work best at various times as well as various contexts, in seeking equality between the sexes.

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n55. See Becker, supra note 13.

n56. Guido Calabresi & Philip Bobbitt, Tragic Choices 195 (1978) (discussing tragic choices rather than equality between the sexes).

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The same point may be made in the context of speech. In a world in which people are seen as autonomous adults with stable preferences (the framer's world), speech issues are simpler than in a world in which we perceive our interdependency and the extent to which our preferences are influenced by our experiences, including the speech we hear and have heard. Once the complex nature of these relationships is perceived even dimly, speech issues become exceedingly complex. Often, there are speech concerns on all sides of an issue, as Nagel has noted. n57 What will work-what will allow for the appropriate amount of speech, particularly on political issues, yet give all citizens a chance to develop fully and participate in a good life-may be far from clear. Judicial review, by limiting experimentation, may make it impossible to achieve better solutions than those a majority of the nine individuals on the Court can imagine.

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n57. Robert F. Nagel, How Useful is Judicial Review in Free Speech Cases?, 69 Cornell L. Rev. 302, 323-24 (1984).

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[*992]

The need to experiment suggests that binding judicial review can keep off the agenda of normal politics solutions that may be optimal. But binding judicial review interferes with democratic deliberations in far more intrusive and invasive ways.

C. Democratic Deliberations

There are a number of ways in which binding judicial review can interfere with political movements and impede quality in democratic deliberations. This

point is especially important since women are a majority group; to the extent that binding judicial review is a barrier to women's successful use of their political power as a majority group, it is illegitimate. In the discussion that follows, I note three major problems: legitimizing the status quo; keeping important controversies off the agenda of ordinary politics while obscuring their difficulty; and interfering with political movements.

1. Legitimating the status quo.

An ineffective equality standard, such as that arguably adopted by the Court, can not only improve the situation of men; n58 it also legitimates and stabilizes the status quo, keeping men in control of what equality between the sexes means without effecting real change. If the Supreme Court requires equality between the sexes, what exists must be equality. n59 If women complain thereafter, their whining cannot deserve serious consideration. n60

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n58. See infra text accompanying notes 117-36.

n59. For a similar argument about the effect of Brown and Miranda, see Seidman, supra note 28; see also Patricia J. Williams, The Alchemy of Race and Rights: Diary of a Law Professor 98-130 (1991).

n60. See Seidman, supra note 28, at 715 (making a similar point in the context of race).

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There exists a more insidious form of this problem. We revere our Constitution. To the extent that injuries to women are someone else's constitutional right (in the sense that effective remedies are unconstitutional), women are less likely even to see their injuries as such or as an appropriate point for political organization and protest. As Robin West has noted: "The tendency of all subordinated persons toward self-belittlement by trivializing the nature of their injuries is geometrically enhanced by the self-perception that their injuries do not exist because their infliction is constitutionally protected." n61 There can be no more effective way to deter effective political action by a majority group than to turn their injuries into [*993] the constitutional rights of others so effectively that the injuries become invisible as such, though not unfelt. Free speech often functions in this manner; take, for example, the question of regulation of pornography.

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n61. Robin West, Constitutional Skepticism, 72 B.U. L. Rev. 765 (1992).

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2. Keeping important controversies off the ordinary democratic agenda and obscuring their difficulty.

Judicial review removes important issues from the normal agenda for political debate and gives them to the nine justices on the Supreme Court. Often, the result is that controversial issues are obscured. Democratic processes cannot

easily work out a new consensus because the question is obscured by the Court or off the agenda for ordinary democratic resolution. This problem was identified by James Bradley Thayer at the turn of the century, pointing out how binding judicial review can degrade the quality of democratic deliberations both in legislative bodies and in the broad political life of the nation:

> The legislatures are growing accustomed to [judicial] distrust and more and more readily inclined to justify it, and to shed the considerations of constitutional restraints,-certainly as concerning the exact extent of these restrictions,-turning that subject over to the courts; and what is worse, they insensibly fall into a habit of assuming that whatever they could constitutionally do they may do,-as if honor and fair dealing and common honesty were not relevant to their inquiries....
>
> ....
>
> The tendency of a common and easy resort to [judicial review], now too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that. n62

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n62. Thayer, supra note 2, at 103-04, 107; see also Nagel, supra note 57, at 324; Brest, supra note 3, at 670-71; Commager, supra note 3.

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Judicial review removes many important questions from democratic deliberations and debate, thus degrading those processes.

When constitutional issues are regarded as beyond the scope of ordinary politics, the public is deprived of the opportunity to learn through discussions about constitutional problems. Indeed, the language of our Supreme Court tends to mask, rather than illuminate, the complexity of constitutional questions, supporting its own legitimacy by making decisions seem inevitable. This tendency serves to hide the real issues and their complexity from the public. I give examples from sex equality and first amendment. [*994]

Under the intermediate standard of constitutional review for sex discrimination, the Court considers whether or not a sex-specific classification reflects traditional stereotypes. From reading the rationales of cases, one would think that any distinction reinforcing stereotypes will fall. But some distinctions reinforcing traditional stereotypes have in fact survived. n63 The reasoning seems to turn on the outcome the Justices want to present as legitimate, indeed inevitable. If the Court is striking the classification, it says the classification reinforces traditional stereotypes. n64 If it is upholding the classification, it says the classification is justified by continuing differences between women and men. n65 Often, the Court is free to take either approach since many traditional stereotypes have continuing validity. For example, mothers continue in the vast majority of families to be primary caretakers of children during marriage. The Court's approach obscures the tension between meeting the needs of real women today and breaking with traditional patterns of behavior. n66 The Court's tendency to hide this conflict is understandable. The more open the question, and the less inevitable the Court's decision, the less legitimate the Court's decision is likely to be

perceived to be. But in supporting its own legitimacy, the Court obscures important issues in the debate over how best to achieve equality between the sexes.

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n63. See, e.g., Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981); Rostker v. Goldberg, 453 U.S. 57 (1981); Kahn v. Shevin, 416 U.S. 351 (1974).

n64. See, e.g., Orr v. Orr, 440 U.S. 268, 283 (1979); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982); Califano v. Goldfarb, 430 U.S. 199, 207 (1977).

n65. See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974); Rostker, 453 U.S. 57; Michael M., 450 U.S. 464; Geduldig v. Aiello, 417 U.S. 484 (1974).

n66. See Becker, supra note 13.

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Robert Nagel has made a similar point in the context of free speech. The Supreme Court tends to act as though free speech concerns exist only on one side of a given issue. Thus, in cases with real indeterminacy and speech concerns on both sides, the Court obscures the real issue and deprives citizens of the opportunity to understand the complexity of First Amendment issues. n67 One of Nagel's examples is the Fairness Doctrine. In the early cases "the Court emphasized the rights of the viewers rather than those of the broadcasters, who the Court labeled "mere licensees" so that speech concerns appeared to favor only the Court's outcome. n68 Again, one [*995] imagines that this judicial tendency is based on the need to present controversial outcomes in open cases as inevitable rather than as perhaps imperfect resolutions of exceedingly complex questions with strong competing concerns on both sides of the issue.

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n67. Nagel, supra note 57, at 323-24. I do not mean to suggest that I disagree with the approach in these early cases. Rather, my point is that there are usually free speech concerns on both sides of an issue, but the Court is likely to obscure this reality.

n68. Id. at 323.

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Sex equality and free speech concerns overlap, causing additional complexity. For example, the First Amendment tends to keep off the agenda for public discussion consideration of how, in a consumerist-visually oriented society, we might fashion a sexuality less demeaning and better for everyone. Current market forces emphasize women's status as sexual object valued by physical appearance, and they also emphasize voyeurism-the (male) gaze-as sexual stimulus rather than sensuality or touch. These approaches maximize consumption of everything from beauty products for women to pornography for men. But these approaches may be much more frustrating and alienating (for men as well as women) than a more sensual, physically based, sexuality would be. By constitutionalizing issues

and thus reserving them for federal judges, the First Amendment may inhibit public discussion of how we might construct a more enjoyable and less demeaning sexuality.

Perhaps most troubling is the tendency of judicial review, by taking items off the ordinary political agenda and obscuring their difficulty, to impede or even preclude the development of a new consensus through the resolution of the issue in electoral politics. It seems quite likely that binding judicial review has made it difficult to work out any new consensus on either abortion or equality between the sexes. I discuss this point in more detail below. n69

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n69. See infra text accompanying notes 130-31, 137-46.

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In this subsection, I have noted a number of ways in which binding judicial review can degrade democratic deliberations by keeping important issues off the ordinary agenda of democratic politics and obscuring their difficulty. Ackerman has, however, suggested that binding judicial review can actually sharpen the people's focus on important questions, thus improving democratic deliberations. In discussing the ending of the Lochner era, Ackerman suggests that even the wrong interpretation of the Constitution under binding judicial review in light of new needs and understandings of the nature of the world can serve as an effective focus for political change in a constitutional moment. n70 Thus, a constitutional decision seen as outrageous can be good for a democracy because it can spark a grass roots movement (such as the right-to-life movement [*996] after Roe v. Wade) to overturn itself. This seems, however, a rather bizarre justification for judicial review for at least two reasons. First, it ignores that in sparking a revolution against a decision seen as illegitimate, the Court may also defuse political support for its position; consider, again, the effect of Roe v. Wade on the pro-choice political movement, discussed below. n71 Second, Ackerman's point seems to be that if the judges err, their error may spark a constitutional moment, and therefore it is good to allow the Justices to thwart ordinary democratic processes for decades as pressure for a constitutional shift occurs. But in the end, what has one accomplished other than wasting energy and resources in trying to reverse a wrong decision?

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n70. Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1054-57 (1984).

n71. See infra text accompanying notes 137-46.

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3. Interference with political movements.

The most obvious and direct way in which binding judicial review can interfere with democratic deliberations is by blocking success when an outsider group does attain enough political power to enact an effective legal approach given the problems the group faces. Consider, for example, City of Richmond v. J.A. Croson Co., n72 in which the Supreme Court struck down a thirty percent

minority contracts target for municipal contracts in a city with a population fifty percent African American and a record of only 0.67% of prime construction contracts going to minority businesses in recent years. n73

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n72. 468 U.S. 469 (1989).

n73. It may be that public construction contracts are rife with fraud and that this was a very ineffective way to do anything other than make a very few African-Americans rich. But the effectiveness of such a remedy should surely be a matter of legislative judgment, not constitutional moment.

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Although Croson involved race, the affirmative action cases, to the extent they discourage the most effective affirmative action (quotas), illustrate this point with respect to both sex and race. Other examples might occur in the future were women (despite the Court's interference with their political movement) to insist on better legal approaches given their needs and the ubiquitous problem of judicial bias. Women might, for example, decide to pressure state legislatures for a sex-specific custody standard in light of their continuing primary responsibility for children in most marriages and the ineffectiveness of sex-neutral standards to protect their relationships with their children at divorce. n74 The Supreme Court might [*997] well hold such a statute unconstitutional because it would inevitably perpetuate traditional stereotypes and sex roles, though the whole problem arises because those traditions continue in most American families today. n75

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n74. See Becker, supra note 13.

n75. Cf. Orr v. Orr, 440 U.S. 268 (1979) (holding unconstitutional sex-specific alimony statute because it reinforces traditional stereotypes). For a discussion of the resulting inequities under gender-neutral approaches that do not adequately protect long-term homemakers, see infra note 77 and accompanying text.

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Binding judicial review can impede political movements even when the Supreme Court does not actually block success. The relegation of high matters, such as sexual equality, to the courts saps political movements of their strength, particularly after ineffective victories. n76 At the same time, judicial review can mobilize the opposition, and the Court itself will be influenced by the resulting political climate, a climate it has helped create.

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n76. Both of these points are made in the context of race by Seidman, supra note 28.

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When ineffective judicial victories weaken a movement, there may be less grass-roots pressure for change. Yet, real change in the relationship between the sexes is unlikely without change at the grass-roots level. Decisions from on high are unlikely to transform intimate relationships.

Judicial victories protecting one or some outsider groups, but not all such groups, also interfere with the development of effective coalitions. This may be most harmful to the most vulnerable groups, such as lesbians, bisexuals, and gay men. Real or preceived judicial protection of less marginal groups, such as straight women or racial minorities, may mean that these groups are less likely to form effective coalitions with the more marginal groups. Judicial review is, therefore, a "divide and conquer" strategy.

In thinking about the effect of binding judicial review on outsiders' political movements, the appropriate baseline is how these movements would operate were there no such review. Had women focused all the time, energy, and money spent in the 1970s on a direct and single-minded focus on legislatures and legislative reform (including reform of abortion laws and of sex-specific legislation), rather than seeking binding judicial review in one form or another, women might well have ended the decade with more political experience and power. Women would have been different themselves and would have ended up in different places within important institutions. Women's consciousness would have been transformed by their experiences fighting for appropriate reforms. Instead, large amounts of time, energy, money, and commitment were spent on [*998] litigation campaigns and the drive for the ERA in the hope that male judges, operating within a tradition-bound system, would give women equality. Women are more likely to achieve real social equality as a result of a million and one piecemeal legislative changes than as a result of an abstract judicial standard. n77

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n77. See Mary E. Becker, Prince Charming: Abstract Equality, 1987 Sup. Ct. Rev. 201.

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The institution of binding judicial review has encouraged women, a majority group, to rely on mostly-male elite judges for equality rather than on their own political power, thus draining the strength from women's political movement for direct political power. This is dangerous for women. It becomes even more dangerous when one considers that it is futile to look to judges for much in the way of real social change, the subject of the next subsection. The combination of these two problems is exponentially detrimental to women.

D. Futility (Including Perverse Adaptation)

1. Futility and perverse adaptation: the institutional limits of courts.

If women do not learn to use their majority political status to protect their interests, courts can help but little. It is futile to look to judges for much in the way of significant social change. Judges can only decide the cases that come before them (many years after they are filed) and have but limited ability to tinker with complex institutions. Judges do not have the power to mandate social equality or to make abortions available to all women in all economic

brackets in all geographic regions. Another example: it is most unlikely that judges would be willing or able to tinker with the social security system in the complex ways necessary if homemakers are to be protected as well as breadwinners are protected. n78 And, of course, judges operate within a system bound by precedent (tradition), and tradition is antithetical to change. Indeed, unlike legislative bodies, adherence to tradition (precedent) is a necessary component of legitimacy for judicial bodies.

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n78. Mary E. Becker, Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein, & Tushnet, Constitutional Law, 89 Colum. L. Rev. 501 (1989).

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Indeed, judicial decisions mandating equality between the sexes in radical ways-for example, requiring the full integration of women throughout the services, including combat n79-would be counterpro [*999] ductive. Such a decision would spark enormous resentment and a powerful backlash. It would likely be reversed, either as a result of careful judicial appointments or constitutional amendment. Real change in the status between the sexes is more likely to come as a result of change from the bottom up, than as the result of a mandate from on high.

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n79. Cf. Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that because women need not be required to serve in combat, they need not be registered for a possible draft).

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Closely related to the problem of futility is the danger of perverse adaptation. Social systems can, and often do, adapt to legal rules without real change, or in ways that are actually perverse but beyond the scope of the standard articulated by the Court. In the next subsection, I illustrate this problem with an example based on the Supreme Court's sex equality jurisprudence. n80

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n80. See infra text accompanying notes 122-25.

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This problem of futility is the result of the particular individual rights in our Constitution as well as the practice of binding judicial review. The Bill of Rights details a number of primarily negative rights, that is, rights to be free from government interference. Thus, the First Amendment forbids government interference with religious beliefs and practices, with peaceful assemblies, and with speech and the press. The Fourth Amendment protects the right of people to be secure in their homes from government interference. The Fifth Amendment provides for special protection of "property" rights. n81

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n81. To be sure, even these "negative" rights require "affirmative" government action. See Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873, 888-91 (1987).

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Because each of these rights is only negative (and there are no positive rights in the Bill of Rights other than the rights to certain procedural protections in judicial proceedings), they are more valuable to the more powerful. Looking to judges interpreting our Constitution for equality between the sexes is likely to be particularly futile because it has the wrong rights from the perspective of women.

Consider, for example, that those who control religions are more likely to be able to participate in a religion designed to meet their needs and satisfy their desires without contributing to their own social subordination. Women, who have been excluded from leadership in most mainstream religions in the United States (and who continue to be excluded from leadership in the Catholic and Mormon Churches), are less able to choose religions molded by the needs of women. Because they are poorer and have heavier domestic responsibility than men, women have less leisure and fewer resources for peaceful assembly. Because women are poorer than men and because when the media speaks it is overwhelmingly men who speak (and who speak disproportionately about men or in ways that [*1000] reinforce stereotypes and the primary importance of youth and physical appearance for women), the rights of free speech and press are less valuable to women than men. The right of security in the home free from governmental interference protects best those who do not need protection from others in the home. Property rights are most valuable for those whose labor is most likely (unlike women's reproductive and domestic labor) to translate into traditionally recognized forms of "property." In a very general sense, the rights enshrined in the Bill of Rights are conservative; they are most valuable to the powerful, and often operate in the real world to buttress the power of those who hold them. n82

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n82. For a discussion of the points in this paragraph, see generally Becker, supra note 22, at 458-86.

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This concern becomes more pointed when one considers the real world effects of freedom of religion and of the press. As I have discussed in detail elsewhere, n83 mainstream religions in this country are deeply sexist. And sexism in religion hurts women politically. The empirical literature suggests that mainstream Christian religions are barriers to women's effective use of their majority status to achieve social equality. Regardless of denomination, those who attend Christian n84 religious services more often are more likely to take antifeminist positions. This phenomenon is not simply the result of self selection by autonomous adults, with the more conservative tending to go to church more often. Religion continues to be successfully passed from parents to children. And women who have feminist beliefs are likely to have had parents who were Jewish, atheistic or agnostic. n85

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n83. Id.

n84. I have been unable to find an empirical study disaggregating religious and secular Jews to determine whether attendance at Jewish religious services has a similar effect. Numerous studies show that religious Christians are more likely than other Americans to disagree with feminist points of view. Id. at n.100.

n85. Id. at 474.

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Similar points can be made about freedom of speech and of the press. These rights, as understood today, protect most the speech of those with the power to speak, particularly those who control the media. n86 These rights protect most those who are presented in the media as dominant and a majority of the population: white men. The costs of free speech are born disproportionately by those [*1001] groups who lack the means to speak and who are presented in the media as subordinate.

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n86. See, e.g., Schauer, supra note 27; Balkin, supra note 27. For a discussion of the early cases suggesting a shift in the understanding of the First Amendment over time, see Daniel Hildebrand, Free Speech and Constitutional Transformation, 10 Const. Commentary 2102 (1993).

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For women in a consumer society dominated by visual images, the presentation of women as beings evaluated primarily in terms of youth, physical appearance, and attractiveness to men, n87 "free" speech is a key component in keeping women, a majority group, subordinate. Under capitalism, advertisers (and the media they support) have powerful financial incentives to convey these messages incessantly, since the woman who sees her physical inadequacy as of prime importance is most likely to spend money (and time and energy) in an effort to improve her looks (and will therefore have less time and energy for politics). She is also likely to blame her problems on personal inadequacies rather than on an unjust social and legal order.

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n87. Dorothy C. Holland & Margaret A. Eisenhart, Educated in Romance: Women, Achievement, and College Culture (1990).

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Pornography is an extreme example of my point. To the extent that the First Amendment protects pornographic "speech," n88 it shields from democratic reform speech which contributes to the subordinate status of a majority group.

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n88. See American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

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Readers may immediately object that, but for the First Amendment guarantee of free speech, women would likely be worse off, because government would be free to censor feminist speech. This is one specific example of a more general justification for judicial review: that it supports democratic practices by protecting outsider groups from the tyranny of the "majority." In its more general form, I will discuss this point in section II of this essay, which considers the justifications for judicial review in response to the antimajoritarian difficulty.

The proposition that binding judicial review promotes greater tolerance of feminist speech would be difficult to prove. A variety of social factors are likely to be far more important to governmental tolerance of feminist speech than the presence or absence of such review in a society. Consider, for example, the fact that feminist speech has often been treated similarly in the United States and England, though the latter has no written constitution and hence no binding judicial review of a free speech clause. Indeed, in recent years, there has been more censorship of feminist speech in the United States than England, despite the promise of a written First Amendment. [*1002]

Historically, both England and the United States have censored much feminist speech, even simple information about birth control (which was regarded as obscene), during the nineteenth and early twentieth centuries. n89 Neither country's government censors private feminist speech today. In recent years, the United States has, however, censored some feminist speech despite our free speech clause: doctors receiving certain federal funding could not mention abortion to a pregnant woman under the Reagan and Bush administrations, though it was the safest available medical treatment. n90 England has not censored such speech. This comparison suggests that whatever the source of the unwillingness today for government to censor feminist speech, it is not necessarily the free speech clause.

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n89. Elizabeth Barrett Browning was censored in the United States (Boston) and England. Contraceptive information was banned in both countries. Anne Lyon Haight, Banned Books: Informal Notes on Some Books Banned for Various Reasons at Various Times and in Various Places 49, 63-64, 74-75, 77 (1970).

n90. See Rust v. Sullivan, 111 S. Ct. 1759 (1991).

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Thus far I have talked about the problem of futility in terms of the limited institutional power of courts, particularly in interpreting our Constitution with its wrong rights from the perspective of women. I now turn to consider the alternative: the legislature. Binding judicial review might not be very effective, but the alternative might nonetheless be worse. Would women do even worse in legislative bodies without binding judicial review?

2. The institutional limits of legislatures.

Given the problems with binding judicial review, there is most likely to be a greater upside potential for women in legislative change without binding judicial review. This will almost certainly become increasingly important in the future, as women continue to increase their direct political power. On the other hand, women face significant problems in legislative bodies, and the downside risk may also be greater in legislative bodies without the limitations imposed by binding judicial review. I expand on these points in the remainder of this subsection.

Two advantages of legislative bodies have already been alluded to: it is possible to make a broader range of arguments to legislatures and legislatures can make a greater range of legal changes, particularly if not limited by binding judicial review, because they are not bound by precedent.

As Robin West has noted, many equality arguments can be formulated with much greater ease for presentation to legislatures [*1003] than to the courts. For example, it would be easy to argue to a legislature that equality for women includes protection for marital rape, though the argument would be difficult to make before the Supreme Court of the United States. n91 This same point could be made about countless legal rules that need change in many jurisdictions: child support and maintenance awards should be higher after divorce; the statute of limitations should toll on tort actions for damages resulting from sexual abuse as a child until the plaintiff could reasonably be expected to realize the nature of her injury; no should mean no in rape, regardless of the defendant's subjective understanding; and hate crimes should include violence against women, to name just a few. One could, with much greater ease, make arguments for these changes in terms of equality for women before legislatures than before the United States Supreme Court.

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n91. See, e.g., Robin West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 Fla. L. Rev. 45 (1990); see generally Robin West, Progressive and Conservative Constitutionalism, 88 Mich. L. Rev. 641, 717 (1990) (arguing that progressives should make their constitutional arguments to legislatures rather than courts; it is even easier "to state" such arguments to legislative bodies).

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Consistent with what one would expect given courts limited institutional power to effect change, women have achieved many of their most significant legal changes in fora other than courts. Even when women could not vote, they were a majority of the population and were often successful at influencing executive and legislative bodies. With the exception of the limited protections accorded elite married women under equitable trust doctrines, married women gained property rights as a result of legislative, not judicial, change, before women obtained the vote. n92 Later nineteenth and early twentieth century reform movements, including temperance and workplace protections for women (such as limits on the hours women could be required to work) also used legislative fora. n93 Early safety nets for widows and some mothers came from legislative bodies. n94 Although women tried to win the vote in courtrooms, the exceedingly onerous constitutional amendment process proved easier. n95

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n92. Richard H. Chused, Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1398 (1983); Marylynn Salmon, Women and the Law of Property in Early America 81-86, 97-100 (1986).

n93. See Eleanor Flexner, Century of Struggle: The Women's Rights Movement in the United States 208-21 (rev. ed. 1975); Theda Skocpol, Protecting Soldiers and Mothers: The Political origins of Social Policy in the United States (1992).

n94. Skocpol, supra note 93.

n95. See Flexner, supra note 93; Sandy Rierson, Race and Gender Discrimination Under the Fourteenth Amendment: A Case for Equal Treatment (forthcoming article) (on file with author).

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[*1004]

Many post-suffrage legal changes important to women were also the result of legislative change. Reforms aimed at violence against women, such as changes in consent standards in rape, rape shield statutes, and regulations of pornography, have tended to come from legislative fora. Indeed, changes of consent standards have been relatively ineffective because of narrow judicial interpretations. n96 And courts have consistently struck statutes providing broad remedies for pornography. n97

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n96. See Estrich, supra note 19.

n97. See, e.g., American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986); Rabe v. Washington, 405 U.S. 313 (1972).

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More recent improvements in safety nets especially important to women as caretakers of children have also come from legislative bodies. Although courts have considered, for example, whether there might be a constitutional right to an equitably-funded education, such cases have failed because the rights in the federal Constitution are primarily negative. n98 Social security, medicare, medicaid, food stamps, programs for improving medical care and nutrition of pregnant women and young children, are all the result of legislation.

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n98. See, e.g., San Antonio v. Rodriguez, 411 U.S. 1 (1973) (holding constitutional funding of schools through local property taxes). Some rights-such as property-do involve affirmative governmental protection. See, e.g., Sunstein, supra note 81, at 888-91.

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Improvements in recent years in child support standards and child support enforcement mechanisms have both been the result of legislation designed to increase the shockingly low levels of support ordered and enforced under rules developed by (and for) mostly-male judges. As a result of judicial decisions about enforcement of support orders, child support has traditionally been at the option of the father because courts regarded support orders as unenforceable per se. An order could be enforced only to the extent support was past due, and the larger the amount past due, the more likely the judge would decline enforcement of the entire past-due amount as too onerous. Thus, women trying to raise children on women's wages without support were required repeatedly to hire lawyers to enforce only small amounts of past due support, with the predictable result that not much support was collected unless fathers voluntarily paid. n99 Congress has greatly improved the situation by making support prospectively enforceable through wage withholding in more and more instances. n100

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n99. See generally Homer H. Clark, Jr., The Law of Domestic Relations in the United States 734-35 (2d ed. 1988).

n100. Id. at 734-43.

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Consider also the cases from the seventies holding sex discrimination not to include pregnancy discrimination. It has been easier to correct the statutory than the constitutional decision. n101 These are two powerful illustrations of how much better women often do when legislative bodies can correct judicial decisions.

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n101. One recent study of congressional overrides of Supreme Court statutory decisions in the period 1969-1990 reports that 38% were conservative whereas only 20% were liberal. William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991).

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Thus far I have discussed two major advantages of seeking change in legislatures unconstrained by binding judicial review: the broader range of arguments one can make before legislatures and the broader range of legal changes legislatures can make. These must be assessed in light of women's majority status and political power today. Although in the past women tended to be less likely to vote than men, women are now the majority of voters and tend to vote somewhat differently from men, giving women significant political leverage. Women are already present in state legislative bodies at significantly higher proportions than in the federal judiciary. n102 And empirical studies of legislators reveal that women are more likely, across ideology and party affiliation, to support legislation important to women. n103 Although there might be more women on the Supreme Court, proportionately, than in many state legislatures, the women on the Court would continue to be bound by man-made precedent. Women's political representation and power will also continue to grow, and women in legislatures will not be constrained by precedent and

existing legal rules as women on the bench will be.

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n102. In 1993, 20.4% of the 7424 state legislators in the United States are women. Center for the American Woman and Politics, Rutgers University; 10.9% of the 1993 Federal Judiciary is female. Alliance for Justice. In 1993, women hold 9.9% of the seats in the U.S. Congress, Center for the American Woman and Politics, Rutgers University.

n103. Debra L. Dobson & Susan J. Carrol, Reshaping the Agenda: Women in State Legislatures (Center for the American Woman and Politics, 1991); Susan Welch & Sue Thomas, Do Women in Public Office Make a Difference?, in Gender and Policymaking: Studies of Women in Office (Center for the American Woman and Politics, 1991); Rita Mae Kelly et al., Female Public Officials: A Different Voice?, 515 Annals Am. Acad. 77 (1991).

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Women do, however, face certain risks in throwing questions to legislative bodies without binding judicial review. Legislatures have often enacted laws harmful to women, such as the nineteenth century bans on abortion n104 and even the dissemination of birth- [*1006] control information (the latter was regarded as obscene), n105 statutes requiring corroboration for rape and utmost resistance. n106 Some protectionist legislation hurt many women: for example, laws keeping women from working in factories at night. n107 Many state statutes limited women's participation on juries. n108 Sex was added to Title VII's ban on employment discrimination as an accident. And it was the courts (not the executive) that first showed any interest in enforcing the ban. n109

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n104. By 1900, every state had laws banning abortions, and many imposed criminal sanctions. Kristin Luker, Abortion and the Politics of Motherhood 15 (1984). See also Eugene Quay, Justifiable Abortion, 49 Geo. L.J. 395, 447-520 (1961). In 1873, Congress passed the Comstock Act, which made sending contraceptives or information about them through the mail illegal. Many states passed "little Comstock laws," banning contraceptive information and limiting the sale of contraception. Irving J. Sloan, The Law Governing Abortion, Contraception and Sterilization (1988).

n105. David Rabban, The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History, 45 Stan. L. Rev. 47 (1992).

n106. See Note, Recent Statutory Developments in the Definition of Forcible Rape, 61 Va. L. Rev. 1500, 1529-33 (1975). State statutes also required "utmost resistance" from the victim. Id. at 1509.

n107. Judith Baer, The Chains of Protection: The Judicial Response to Women's Labor Legislation (1978).

n108. By World War II, 21 states still prohibited women jurors. Note, Beyond Batson: Eliminating Gender-Based Peremptory Challenges, 105 Harv. L. Rev. 1920 (1992). Other states automatically excluded women from jury-selection lists unless they requested otherwise. See Hoyt v. Florida, 368 U.S. 57 (1961).

n109. See, e.g., Phillips v. Martin Marietta, 400 U.S. 542 (1971).

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Further, women face numerous obstacles to effective use of their political power within legislative bodies. n110 Even today, legislatures are old boys' clubs reluctant to cede power to women. Women are often regarded in stereotypical ways (sometimes helpful, sometimes not) by voters and politicians. Women seem to have difficulty raising early (seed) money and getting early support from within their own party. Women are often assigned to committees seen as appropriate for their sex. Voters do not always seem willing to vote for a woman, particularly for high office. n111

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n110. See, e.g., Becker, supra note 22 (discussing political obstacles related to rights enshrined in the Bill of Rights); Mary E. Becker, Politics, Differences and Economic Rights, 1989 U. Chi. Legal Forum 169 (discussing political obstacles related to heterosexuality); Becker, supra note 78 (discussing political problems but also noting problems with abstract judicially-imposed equality).

n111. On problems women face in electoral politics, see generally Clark, supra note 24, at 63, 74-75; Susan J. Carroll, Women as Candidates in American Politics (1987).

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Finally, courts have often reached decisions favorable to women without legislative direction. For example, as suggested earlier, courts of equity used trust law to give elite women control over property from an early date, far earlier than the Married Women's Property [*1007] Rights legislation. n112 Or consider the nineteenth century change in custody standards at divorce or separation: judges as well as legislators were involved in the shift from absolute paternal custody rights to a maternal preference for children of "tender years." n113

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n112. See supra text accompanying note 92.

n113. See Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (1985); J.Bishop, Commentaries on the Law of Marriage and Divorce 544 (4th ed. 1864).

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It is also true that as a result of judicial decisions, some constitutional limits have been imposed on certain procedures or requirements for safety nets. n114 These limits are, however, much less important than are benefit levels, and the Supreme Court has refused to find general restrictions on benefit levels unconstitutional. n115 Further, procedural requirements without meaningful substantive rights can result in much wasteful and expensive "process" without necessarily adequate protection of the rights represented in the process. For example, in Cook County Juvenile Court, many lawyers stand up for each case,

but neither mothers nor children, almost all of whom are poor and African American or Hispanic (troubled white families do not end up in Cook County Juvenile Court) are adequately represented by anyone, though the county "provides" overworked lawyers for both mothers and children. n116

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n114. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (one-year residency requirement for welfare benefits unconstitutional interference with right to travel); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (similar requirement for nonemergency medical care; similar result).

n115. Dandridge v. Williams, 397 U.S. 471 (1970) (upholding Maryland lid of $ 250 per month on welfare benefits regardless of family size or need).

n116. Bernardine Dohrn, Work in Progress Presentation to Chicago Area Feminist Colloquium (Jan. 26, 1993).

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To be sure, some of the judicial decisions on equality and fundamental rights in the seventies and eighties helped women. It is to those "good" decisions that I turn next.

E. The "Good" Cases

Two sets of cases are commonly seen as especially favorable for women: the equality cases, in which the Supreme Court held that some sex-specific distinctions violate the Constitution's equality provision and abortion decisions, in which the court held that some restrictions on abortion violate the Constitution's privacy principal. I discuss these cases briefly in this section, pointing out that binding judicial review even in these areas may have done more harm than [*1008] good, though we cannot, of course, be sure. In any event, given the Court's interference with abortion politics over a twenty year period, I am not arguing for the reversal of Roe v. Wade today. By its entry, the Court has changed the political landscape and disengagement twenty years later cannot turn back the clock.

1. The equality cases.

Beginning with Reed v. Reed in 1971, the Supreme Court struck as unconstitutional some, but not all, legislative classifications distinguishing between women and men. Under the formal-equality standard used by the Court in these cases, a standard which gives a fair amount of discretion to the Justices themselves, the Supreme Court has struck a number of trivial discriminations as unconstitutional while allowing important discriminations to stand. Many of the victories were actually victories for men. And some of the decisions have hurt women, particularly in the area of family law. This combination of results suggests all of the problems outlined above, particularly futility. Let me give examples of each point.

The trivial victories for women include cases such as Reed v. Reed, the initial 1971 case in which the Supreme Court struck a state statute giving men a preference as executors of estates of deceased relatives. The case is trivial in the sense that this distinction has never been an important component of the

systemic subordination of women. Reed v. Reed was followed, to be sure, by sex-neutral revisions to state and federal codes, and these revisions were often of great importance. n117 But some of the changes-particularly the elimination of sex-specific rules in family law-hurt women (perverse adaptation). Most, if not all, of the other changes were probably trivial in the sense that the sex-specific rules were archaic and would have fallen soon even absent binding judicial review.

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n117. Wendy W. Williams, Notes From A First Generation, 1989 U. Chi. Legal Forum 99, 111.

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Indeed, had Reed v. Reed been reached under limited judicial review, the statute would have been struck as constitutionally suspect because probably archaic. Legislatures could then have considered which sex-specific rules to keep and which to let die. Given the continuing need for sex-specific rules in family law, discussed below, this result might well have been far better for women than Reed v. Reed under binding judicial review. Indeed, in the end, most sex-specific statutes were eliminated by legislative commissions at the state and federal level rather than through case-by-case litigation. [*1009] Even without Reed v. Reed, these commissions would almost certainly have been formed during the seventies to revise archaic sex-specific laws.

The important (and harmful) distinctions allowed to stand by the Supreme Court include distinctions between pregnant and nonpregnant persons, n118 veterans' preferences for state employment (making it possible to keep women almost exclusively in the lower rungs of state power structures), n119 and between women and men for purposes of draft registration (the combination of these last two is especially maddening). n120 The victories for men include the right of a man eighteen to twenty years of age to buy 3.2 percent beer n121 and the right of a widower to the social security benefits available to a widow. n122 Thus, the equality cases support the suspicion that it is futile to look to the courts for much in the way of real changes: the cases are, for the most part, trivial victories for women, victories for men, or important losses for women.

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n118. Geduldig v. Aiello, 417 U.S. 484 (1974).

n119. Feeney v. Personnel Admin., 442 U.S. 256 (1979).

n120. Rostker v. Goldberg, 453 U.S. 57 (1981).

n121. Craig v. Boren, 429 U.S. 190 (1976).

n122. Califano v. Goldfarb, 430 U.S. 199 (1977).

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In a set of cases often detrimental to ordinary women, the courts have applied formal equality notions in family law contexts, without any

consideration of whether the results would leave women and children poorer and more vulnerable after divorce than they had been. The result has been perverse adaptation: Supreme Court cases intended to advance women towards equality actually turn out to be ineffective or even bad for women. This should not be a surprising result of binding judicial review given the institutional limits of the courts. Social systems often adapt to legal rules without real change, or in ways that are actually perverse but beyond the scope of the standard articulated by the Court.

For example, in a case in the late seventies, Orr v. Orr, n123 the Supreme Court struck a sex-specific alimony statute as a violation of the equality provision of the Fourteenth Amendment. States are free, under Orr, to adopt gender-neutral rules that adequately protect homemakers, particularly long-term homemakers, but have not tended to do so. Instead, long term alimony has become increasingly rare under modern, gender-neutral rules, leaving women worse off. n124 State actors allocating resources at divorce accepted the notion that [*1010] women were equal in a perverse way: as the equals of men, women can jolly well earn their own way after divorce. Equality is embraced to free men from financial obligations after divorce but not to achieve greater economic equality between women and men after divorce. In general, equality in family law contexts has meant the elimination of important protections for women and children without the development of equally effective sex-neutral laws, and has hurt many women (and children), especially ordinary, non-elite women. n125 Thus, perverse adaptations to equality decisions by the Supreme Court can result in little real change or even in increased inequality .

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n123. 440 U.S. 268 (1979).

n124. See, e.g., Ann Laquer Estin, Maintenance, Alimony, and the Rehabilitation of Family Care, 71 N.C. L. Rev. 721 (1993).

n125. See, e.g., Martha Albertson Fineman, The Illusion of Equality (1991).

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These cases also illustrate that women are likely to do better when legislative bodies can correct errors because the issues are within the scope of ordinary democratic deliberations. If a step is taken in the wrong direction, women are likely to have an easier time correcting it when legislative correction is possible. Recall the pregnancy discrimination cases in the seventies, mentioned above, n126 holding that for both constitutional and Title VII purposes, sex discrimination did not include pregnancy discrimination. Congress, as a result of pressure from women changed Title VII. n127 The constitutional holding was recently affirmed by the Supreme Court in a decision holding that a civil rights statute did not protect abortion clinics and women in need of abortions from harassment and coercion from right-to-life advocates. n128 It is of course true that sometimes, in some situations, for some reason the courts may be more committed to change (or committed sooner) than the legislature. For example, sex was initially added to Title VII as a floor amendment its sponsor hoped would defeat the Bill. Its passage was accidental in a sense. n129 Much of the initial impetus for giving the ban on sex discrimination some real meaning came from the courts, including the Supreme Court. n130 It is nevertheless true that a Supreme Court constitutional

mistake is harder to erase than a legislative blunder. Women are a majority of voters, and as such unconstrained by precedent apart from binding judicial review.

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n126. See supra text accompanying note 42, 51-52.

n127. 42 U.S.C. 2000e(k) (1988).

n128. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

n129. See Flora Davis, Moving the Mountain: The Women's Movement in America Since 1960, at 38-45 (1991).

n130. See, e.g., Phillips v. Martin Marietta, 400 U.S. 542 (1970). The EEOC was not initially interested. See Davis, supra note 129, at 45-47.

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Part of the problem with the Supreme Court's decisions, in terms of interference with women's political effectiveness, is that it is now more difficult-because of what the Supreme Court itself has done-to get important issues, such as the possibility of a continuing need for some sex-specific family law rules, on the ordinary democratic agenda. The Supreme Court has interfered with, degraded, ordinary democratic deliberations by contributing to the common perception that sex-neutral approaches are crucial to, indeed the definition of, equality between the sexes. The Supreme Court itself has thereby impeded women's ability as a political force to get important issues even on the agenda of ordinary politics.

By keeping how best to approach equality between the sexes off the agenda of ordinary political deliberations, the Supreme Court has also impeded the debate and experimentation necessary for movement towards a new consensus on this important issue. Often, it is the experience of the polity in resolving an important and contested issue through democratic processes, that helps create a new consensus. To the extent equality between the sexes is seen as either reserved primarily for the Supreme Court or equivalent to what the Supreme Court has held it means, the Court's decisions block the experiences necessary to develop any new shared understanding of what it might mean.

It is true that my objections to binding judicial review of sex-based classifications are in part based on my objections to the Court's standard. But, even given the Court's standard, critically-important decisions came out wrong in the eyes of those feminists who advocated that standard. For example, the feminists who supported in general the Court's equality approach argued against its outcomes in three important cases: Rostker, n131 Feeney, n132 and Geduldig. n133 And, as argued above in discussing the pragmatic objection to judicial review, to some extent my dissatisfaction with the standard developed by the Court as a matter of binding constitutional law is precisely the point. There is no consensus on the meaning of sex discrimination. We cannot imagine a world with perfect equality between the sexes. Nor is there any consensus about what it would look like or how to get there. Judges, inevitably, are making into binding constitutional rules their own current opinions on this com [*1012]

plex question. In doing so, they may foreclose the experimentation that may be necessary if we are to change the distribution of power between the sexes. n134

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n131. Rostker v. Goldberg, 453 U.S. 57 (1981).

n132. Feeney v. Personnel Admin., 442 U.S. 256 (1979).

n133. Geduldig v. Aiello, 417 U.S. 484 (1974).

n134. See supra notes 53-56 and accompanying text.

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Finally, these sex equality cases illustrate that it is futile to look to abstract legal rules enforced by judges to effect social change. n135 Concrete legislative tinkering is often necessary. For example, courts implementing abstract equality notions have not, and are not likely to, make the kind of changes needed if social security is to afford homemakers the same level of protection against poverty in old age as enjoyed by wage workers. n136 Legislative change is necessary, but women's legislative experience and power have been limited by reliance on the Court to achieve equality.

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n135. For a similar argument, see Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change (1991).

n136. Becker, supra note 78.

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2. The abortion cases.

Roe v. Wade seems the most unambiguous example of a Supreme Court decision (utilizing binding judicial review) that has been good for women. Perhaps this perception is correct, and alternatives would have been worse. In this subsection, however, I suggest that even the abortion cases were not cost-free. Perhaps the costs outweighed the gain (or would have if Bush had been reelected, a risk certainly unforseeable at the time Roe v. Wade was decided).

Judicial resolution of a controversial issues can not only sap a political movement for change of its strength, but can also mobilize the opposition with the Court itself susceptible to pressure in the subsequent political climate. I am not questioning the importance of choice to women, but rather the utility of resolving the issue in the courts. Although the right to a legal abortion does contribute to women's sexual availability to men, making it easier for men to pressure women to have unwanted abortions as well as unwanted heterosexual intercourse, n137 the alternative is not a regime in which women are free to say no to sex or to an abortion without pressure from their male sexual partners, but one in which heterosexual activity leads, for many women, especially the most vulnerable, to undesired pregnancies which can be terminated only in the more-dangerous illegal abortion market. Given the consequences of preg
[*1013] nancy, legal abortions are important for both social equality and

women's health. These points, however, only support the need for abortion rights, not for such rights as a result of binding judicial review.

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n137. Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987); Michael McConnell, How Not to Promote Serious Deliberation About Abortion, review of Laurence H. Tribe, Abortion: The Clash of Absolutes, 58 U. Chi. L. Rev. 1181 (1991).

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There are a number of costs that might well be associated with the fact that judges, not legislators, have crafted the right to abortion in this country. As an initial matter, it is important to realize that state legislatures were already easing access to abortion and would have continued in this direction had the Supreme Court not done so. With the exception of Ireland (whose situation is obviously different from ours), European countries greatly eased access to abortion during the seventies. And in those nations, abortion is much less controversial than it is today in the United States. n138 The legal abortion rate began rising rapidly in 1969, four years before Roe v. Wade, and actually slowed after the decision. n139 Most legal abortions performed today would be legal had Roe v. Wade gone the other way.

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n138. Mary Ann Glendon, Abortion and Divorce in Western Law: American Failures, European Challenges 10-62 (1987).

n139. Rosenberg, supra note 135, at 178-79.

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Some commentators believe that it was the judicial nature of the easing of abortion restrictions in the United States that roused such fanatical opposition, n140 making it difficult often for women to find an abortion provider without traveling long distances or to enter a clinic once they reach it. Indeed, opposition to the increasing legalization of abortion seems to have increased significantly immediately after Roe v. Wade. n141 Limits on Medicaid funding for abortion (eliminating effective abortion rights for many poor women) arose only after Roe v. Wade. n142 Violent and harassing anti-abortion tactics also followed Roe v. Wade. n143

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n140. See, e.g., Glendon, supra note 138.

n141. Rosenberg, supra note 135, at 185-89.

n142. Id. at 186-87.

n143. Id. at 188.

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In many ways, the judicial origins of women's right to abortion following Roe v. Wade were a source of vulnerability. Judicial resolution of so controversial and open a question inevitably fed the opposition because it made palpable the countermajoritarian difficulty; where can these nine men point for a legitimate authoritative source for their decision? That constitutional law is a system of precedent grounded in tradition was, of course, part of the problem; tradition is not a powerful source of rights important to [*1014] women. Consider, for example, the fact that constitutional scholars, no matter how liberal, seemed wholly unable to imagine a defense of Roe v. Wade throughout the seventies, with the result that the basis of any right to abortion seemed weak indeed. n144 Had the issue been resolved by democratic legislatures, the resolution would have been perceived as of greater legitimacy. n145

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n144. See, e.g., Archibald Cox, The Role of the Supreme Court in American Government 53-55, 114 (1976); Alexander M. Bickel, The Morality of Consent 28 (1975); John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973); Harry H. Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 223, 297 (1973); Paul A. Freund, Storms Over the Supreme Court, 69 A.B.A. J. 1474, 1480 (1983).

Equality arguments did not begin appearing until 1979. See, e.g., Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261 (1992); Catharine A. MacKinnon, Reflections on Sexual Equality Under Law, 100 Yale L.J. 1281 (1991); Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees at 5-25, Webster v. Reproductive Health Serv., 492 U.S. 490 (1989); Calabresi, supra note 1, at 146-49; Donald Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569 (1979).

n145. Perhaps, had Supreme Court used a different rationale, the opposition might have been less virulent. I rather doubt, however, that the rationale mattered. Objections to Roe v. Wade are based in large part on objections to change in traditional sex roles, and no matter how the decisions were justified, choice does foster women's ability to make nontraditional choices. On the relationship between attitudes on choice and commitment to traditional sex roles, see Luker, supra note 104.

In addition, any equality basis would have been very novel and would likely have only strengthened the perception that protection of fetal life mandated opposition to equality for women as well as to choice. Coming from the Court, rather than as a result of democratic processes in which all participated, the abortion decision might well have sparked powerful opposition regardless of its logic.

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Judicial resolution also impeded the development of a new consensus on abortion through legislative and political activity in which all could participate. Perhaps, had the issue stayed a legislative one, the compromise reached in all or many states would have seemed legitimate, or at least legitimate enough to make harassment (and worse) of clinic workers and women entering clinics seem inappropriate, even to most anti-choice activists. It is true that religious fundamentalism rose during this period, but many

fundamentalists might have seen a legislative resolution of the issue as more legitimate than Roe v. Wade.

Although Roe v. Wade seemed to make abortion an absolute right during the first trimester, the Court has been diligent in protecting the right to abortion only for relatively well-off women: adult women who can afford an abortion or whose health insurance covers it. In addition, it helps if one either lives in a very large city or is able to travel whatever distance is necessary to obtain an [*1015] abortion. Younger women, poorer women, and many women in small towns and rural areas are not well protected by the decision. n146 The lines drawn by the Court have fragmented women as a political coalition, giving absolute rights to those most likely to be able to exercise power through the electoral and legislative processes, while leaving unmet the needs of women too young to vote or too poor to have much political power.

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n146. See, e.g., Planned Parenthood v. Aschroft, 462 U.S. 476 (1983); Ohio v. Akron Center for Pub. Health, 110 S. Ct. 2972 (1990) (requiring parental or judicial consent for young women to obtain abortions); Harris v. McRae, 448 U.S. 297 (1980) (upholding a bar on the use of federal funds even for medically necessary abortions). See also Rosenberg, supra note 135, at 189-201.

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Although these decisions merely allowed legislative enactments to stand, the legislation was passed after the Supreme Court had taken the wind out of the sails of pro-choice activists and had provoked virulent opposition to choice by deciding the issue using binding judicial review. Had both sides been focused on the legislative level throughout the seventies and eighties without the distorting political effects of Roe v. Wade, it is possible that the laws passed during that period would not have been so harmful, particularly to poor and young women. Thus, if powerful, pro-choice women had been more involved in legislative reform for their own sake, they might have also demanded legislation that would have better served the needs of less powerful women: poor women and young women.

Moreover, the Supreme Court's commitment to Roe v. Wade did not turn out to be entirely reliable, even for those women best protected by the Supreme Court decisions in this area. After Webster, n147 it looked as though Roe might fall at any time. With Casey, n148 it became clear that one more Bush appointment would be necessary. Had Bush won the election, it is most likely that Roe would have fallen within the next four years. Women would then have had to press for choice at the legislative level without the more-favorable state laws that would have been so easy to pass in the seventies but for Roe. And, of course, we are now safe only through the next four years. Roe may yet fall.

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n147. Webster v. Reproductive Health Serv., 492 U.S. 490 (1989).

n148. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

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The greatest cost of judicially-created abortion rights may have been political: Roe v. Wade has encouraged women to take their eyes off legislative arenas and grass roots organization and to rely instead on the Supreme Court as their protector. Had Roe v. Wade [*1016] gone the other way, considerable feminist time and energy during the seventies likely would have been exerted on pressuring legislative bodies to make needed changes and on election of women to political office for this purpose. Roe v. Wade inevitably deprived women of the valuable political experience and power they would have gained in this drive. n149 In the end, abortion rights for all women, including young women, poor women, and rural women require, even now, legislative protection.

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n149. See Vicki Quade, Who Governs America: Human Rights Interview with Akhil Amar, 18 Human Rts. 26, 30 (1991).

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On the other hand, Roe v. Wade has not been overruled as yet and may not be in the future. And we have probably had a broader right to choose (for those who are old enough and have the means to exercise it) under Roe v. Wade than that which might have been the result of legislative changes in the seventies. Such reforms would likely, in many or most states, have given women only the right to petition some medical board for a determination that abortion was medically necessary, the dominant form in some European countries. n150 And poor women, young women, minority women often have difficulty negotiating such requirements.

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n150. Glendon, supra note 138, at 21. Not all. France, for example, has an absolute right to choose during the first 10 weeks of pregnancy, since the choice of whether to have an abortion is made by the woman alone. The statute does say that abortion is available if her "condition places her in a situation of distress." Id. at 15. Abortion is also elective in early pregnancy in Austria, Denmark, Greece, Norway, and Sweden. Id. at 14.

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On balance, it is impossible to know how even to approach the question of whether binding judicial review in the context of abortion has helped or hurt women. Without a doubt, there are circumstances under which it is easier for some women today to get an abortion than would be the case today had all reform been in the legislative arena. For example, it is likely that some states would not have allowed abortion on demand. On the other hand, opposition to abortion might be much weaker in such states (and elsewhere), so that abortion providers would be easier to find in many areas, clinics easier to enter, and more abortions for poor women funded by the state. Some women are doubtless better off, some worse off. It is, however, clear that Roe v. Wade was not an unmixed blessing.

Whether Roe v. Wade's continuing vitality helps or hurts women is even more complicated. Even if we could know that the Court's initial decision in Roe v. Wade was a mistake, we still could not know whether the elimination of binding judicial review in this area [*1017] today would be good for women. By entering this fray, the Court changed the situation and we cannot now return

to the status quo ante of early 1973. It may well be that women would be better off politically were Roe v. Wade reversed tomorrow, as reflected by the fact that many pro-abortion groups wanted Casey decided prior to the 1992 election (expecting Roe v. Wade to be reversed). On the other hand, reversal would doubtless hurt some women forced to have illegal abortions in the aftermath. Much depends on whether, how, and when the Court reverses Roe v. Wade. If the Court ultimately does reverse Roe v. Wade when the general climate is even more hostile to legal abortion than it is today, some women would in some sense be better off with Roe v. Wade reversed today, so that legislative protections could be established during a relatively favorable period. n151

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n151. Different generations of women would of course have conflicting interests on this point. Women fertile today might be better off with Roe on the books until they are unlikely to become pregnant, whereas younger generations might be better off with reversal today so that more favorable state laws (than those on the books today) could be in place by the time they reach fertility.

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I have not, of course, "proven" that women would be better off today had we no binding judicial review. Perhaps I am wrong, and without the legitimation the Court provided for the norm of sexual equality and abortion rights, women would have done even more poorly in legislatures and elsewhere in the political arena. Or perhaps it made no difference, one way or the other. We cannot be sure. I suspect, however, that if we had no binding judicial review, women would have focused from an earlier date, as we do increasingly today, on women's direct participation in electoral politics. This focus would have been necessary both to eliminate the archaic laws on the books in 1971 and to enact new laws better geared to women's needs, such as better abortion laws.

There are advantages and disadvantages to binding judicial review from the perspective of women; this, like other strategy questions, is one in which we face a double bind. There are risks we run when we rely on women's democratic power, as well as risks when we rely on mostly male judges operating within a system of precedent built by an almost entirely male judiciary.

Judicial review may function as a pressure valve, n152 resulting in enough minor change in the short-term to preclude pressure for [*1018] significant and more effective change in the long term. For example, to the extent that Reed v. Reed and subsequent equal protection cases were victories for women, they represent minor short-term wins whose success inevitably defused mounting pressure for real change in the status of the sexes. In part, the trade off may have been between immediate justice in certain individual cases and real, significant, long-term change.

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n152. Thus, periodic realignments of constitutional doctrine which might appear to justify our constitutional order by more inclusive rulings (rulings purportedly protecting those excluded from the founding) may actually be conservative, entrenching the status quo with little real change while taking off pressure for real change through ordinary politics. Cf. Frank Michelman, Law's Republic 1493, 1515-32 (1988) (justifying progressive constitutional

decisions without considering this danger).

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I suspect that both the upside and downside probability of change for women will be larger with legislative bodies, so that legislative bodies are both more likely to institute awful laws and excellent laws (from the perspective of women) than those that would be enacted and survive in a world with binding judicial review. The enactment of awful laws would, however, goad women to greater direct political participation; such laws need not survive long given women's majority status. In recent years we have seen at least two instances in which women's political effectiveness seemed to increase as a result of decisions that made women angry: (1) Webster, when it looked like Roe v. Wade was about to crumble entirely in the very near future; and (2) the appointment of Clarence Thomas to the Supreme Court despite Anita Hill's testimony and his apparently undisputed record as a consumer of pornography. Both events increased women's determination to elect more women into legislative bodies. In the next election, for example, women's presence in the Senate increased 300 percent. We will never, I suspect, see equality without substantial upside possibility for change. I therefore favor the strategy with the greatest upside: no binding judicial review.

II. The Justifications for Judicial Review

Commentators have advanced two major justifications for judicial review in the face of the objections outlined earlier. The first is that judges are more principled or trustworthy decisionmakers than the populace, particularly with respect to protecting outsider groups, such as unpopular speakers or racial minorities. The second is that judicial review indirectly serves democratic ends, and does so more effectively than commitment of all issues to democratic politics would. This section first considers the need to protect [*1019] minorities from the tyranny of the majority and then the justification based on judicial review's democratic ends.

A. Judges As More Principled Decisionmakers

There are two forms of this argument. One is that judges are more principled-reach better decisions-in general, particularly perhaps in speech cases: judges can better protect unpopular speakers from the tyranny of the majority. The other is that judges protect racial minorities from the tyranny of the majority.

1. Judges as more principled with respect to unpopular speech. n153

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n153. Bickel, supra note 2; Ronald Dworkin, A Matter of Principle 31-71 (1985); Ely, supra note 4, at 105-35.

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It is quite likely that judges reach different decisions that those that would result from democratic processes. That, of course, is part of the problem with binding judicial review in a democracy. Are judges decisions more "principled"? That they are is a very difficult proposition to support. As Ely

has noted, "experience suggests that in fact there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most lawyers and judges, and for that matter most moral philosophers, are drawn." n154 Brest adds "the Court sometimes has exhibited a striking insensitivity and indifference to the poor." n155

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n154. Ely, supra note 4, at 58-59.

n155. Brest, supra note 3, at 667.

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Judges are more likely to protect certain forms of speech than is the general public. n156 But free speech doctrine is not particularly principled in any natural sense. The Court has created an array of doctrinal boxes for speech issues, and determines the result by picking the box. Some boxes protect speech strongly, others do not. The array produced by democratic processes would doubtless be different, but it would not for that reason be less principled. Why, for example, should we consider a judicially-created doctrine that pornography cannot be constitutionally regulated as more "principled" than the contrary decision, particularly when the cost of such freedom is born overwhelmingly by a group rather different from the decisionmakers?

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n156. Id.; Owen Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405 (1986); Bickel, supra note 2, at 49-65.

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With Robert Nagel, I suspect that binding judicial review is not particularly effective at protecting unpopular speech or promoting a more tolerant society. n157 Nagel notes that it was politicians, not judges, who ended each period in our history in which speech was severely repressed (such as the McCarthy era). n158 Binding judicial review might actually be counterproductive, producing a backlash against unpopular speech that cannot possibly be monitored by judges. Speech and tolerance might be better fostered by allowing such unfortunate periods to run their course and seek correction in the political branches. n159 Michael McConnell has concluded that religious minorities receive (like women, I suspect) better protection from legislatures than courts. n160

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n157. Nagel, supra note 57.

n158. Id. at 334.

n159. Id. at 334-449. But see Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449 (1985).

n160. Michael McConnell, Religious Freedom: A Surprising Pattern, 11 Christian Legal Soc'y Q. 5 (1990).

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Although often extremely critical of what the Justices have done under the guise of judicial review, legal scholars nevertheless, as Nagel has pointed out, tend to believe in binding judicial review. n161 It seems possible that legal scholars consider judges better, more principled decisionmakers simply because they themselves come from the same professional class and share the same values. In addition, they may aspire to being judges or even justices some day, and are likely to imagine themselves deciding cases in a more principled way than the polity would. The view that judges are better decisionmakers seems likely to reflect simply the similarities between federal judges and elite mostly white male scholars who assert this view. n162

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n161. Nagel, supra note 57, at 312.

n162. See Catharine A. MacKinnon, Toward a Feminist Theory of the State 162-63 (1989) (male jurisprudence adopts male perspective as objectivity).

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Moreover, it is becoming increasingly difficult to make the judges-are-more-principled argument as free speech becomes an increasingly conservative right. n163 Initially, free speech claims were brought by draft resisters, labor organizers, civil rights activists, pacifists, communists, and similar progressive or left groups with less than their share of power and all too easily silenced by a hostile majority. n164

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n163. See Schauer, supra note 27; Balkin, supra note 27.

n164. Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

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Today, free speech claims are increasingly likely to be brought by rich, powerful, commercial entities (including tobacco companies [*1021] and pornographers), by racist speakers, or to challenge progressive campaign reform legislation n165 As J.M. Balkin has noted, with the fall of absolute freedom of contract, conservative forces today are increasingly finding the absolutist First Amendment an effective substitute. n166 It is likely that increasingly, the First Amendment will conflict with equality and meaningful democracy. n167 Formal guarantees, of the kind the First Amendment has turned into, "generally favor those groups in society that are already the most powerful." n168 If speech continues to come to mean protection equally of the speech of the powerful and powerless, it is likely to be increasingly conservative, so that the net effect on racial minorities and other unpopular speakers n169 is negative.

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n165. Balkin, supra note 27, at 376-78.

n166. Id. at 384.

n167. Id. at 423.

n168. Id. at 396.

n169. R.A.V. v. City of Saint Paul, 112 S. Ct. 2538 (1992).

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Judicial review has never effectively protected most speech because it only reaches government prohibitions or restrictions on speech. Consider how effectively the "free" speech of lesbians, bisexuals, and gay men is protected by today's "absolute" First Amendment. Despite the First Amendment, the vast majority of lesbians, bisexuals, and gay men are still closeted (and thereby denied effective political participation n170) as a result of a million and one discriminatory, harassing, and abusive practices throughout society, in private and public arenas. Often, discrimination is aimed at keeping lesbians and gay men in the closet, that is, silent. Often, the discrimination is by government. It is still invisible and a matter of indifference to most federal judges, no matter how "absolute" their protection of speech.

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n170. See Janet Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity, 36 UCLA L. Rev. 915 (1989); Bruce Ackerman, Beyond Caroline Products, 98 Harv. L. Rev. 713 (1985).

But note that lesbians, bisexuals, and gay men have been protected by the Free Speech Clause of the First Amendment, under which they have won a few cases, that by the equality provision of the Fourteenth Amendment. See William B. Rubenstein, Since When Is the Fourteenth Amendment Our Route to Equality?: Some Reflections on the Hate Speech Debate From a Lesbian/Gay Perspective, 2 Law & Sexuality 19 (1992).

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The ban on open lesbian and gay military personnel illustrates this point well. Few who support the ban expect it to-or even want it to-actually exclude these valuable soldiers. Rather, the point is to keep lesbians and gay men silent, so that heterosexuals (who are free to flaunt their sexuality) need not encounter the [*1022] expression of others'. n171 And most closeting takes place in "private" areas, such as private employment, friendships, and most especially, families. It would be futile to look to federal judges to ensure that, through binding judicial review under a Constitution with primarily negative rights, lesbians, bisexuals, and gay men are free to speak.

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n171. See, e.g., De Trán & Jodi Wilgoren, Debate Fervent in O.C. on Gay-Military Issue, L.A. Times, Jan. 29, 1993, at A1 (one opponent expressed fear of "knowing there is a known homosexual standing next to me in the shower;" issue described as "allowing gays to serve openly"); Delia M. Rios, Restrictions Are Hot Topic Across U.S.; Radio Shows Flooded With Calls; Public Split, Dallas Morning News, Jan. 29, 1993, at 1A (issue whether "openly gay men and women should be allowed to serve in the military").

Even were lesbians and gay men allowed to serve openly, most would remain closeted because of the many risks they would run even if formally allowed to speak by military regulations. See, e.g., Tran & Wilgoren, supra, at A1 (two supporters note that most lesbian and gay soldiers would stay in the closet).

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To date, free speech enforced by judges under binding judicial review, has not meant either free speech for all (even in the most limited sense, ignoring differential distribution of resources) nor tolerance. There is no reason, beyond blind faith in the federal judiciary, to think that in the foreseeable future binding judicial review will lead us to this promised land. n172

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n172. See Stanley Fish, Fraught with Death: Skepticism,. Progressivism, and the First Amendment, 64 U. Colo. L. Rev. 1061 (1993).

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2. Judges are more principled decisionmakers in protecting racial minorities from the tyranny of the majority. n173

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n173. Bickel, supra note 2; Dworkin, supra note 153, at 31-71; Ely, supra note 4, at 135-79.

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Perhaps the most accepted justification for judicial review today, at least among legal scholars, is the need to protect outsider groups-such as racial minorities-from the majority, the latter being too likely to impose on others costs they would not impose on themselves. n174

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n174. See Calabresi, supra note 1; Nagel, supra note 57.

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As indicated in the introduction, I do not try to resolve the question whether binding judicial review of racial classifications is actually good for racial minorities. We could continue to have binding judicial review for racial classifications, however, even if we were to have only limited judicial review for sex-based classifications and fundamental rights such as speech or abortion. On the other hand, as also noted earlier, it may be that the objections to

judicial review apply to review of racial classifications as well. n175

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n175. See supra text accompanying notes 27-31.

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Some commentators see binding judicial review as an important protection for minority speech, citing the early Supreme Court cases protecting civil rights activists under First Amendment doctrine. n176 But recent cases have extended equal First Amendment protection to racist speech, the point of which is to silence racial minorities. n177 Further, as Charles Lawrence has noted, even when the Court has used the First Amendment to protect activists, protection has only been extended to peaceful protesters, n178 though disruptive protest may be as or more politically effective. On balance, many scholars believe that free speech now serves more to suppress than to protect minority speech. n179

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n176. See, e.g., Harry Kalvin, Jr., The Negro and the First Amendment (1965).

n177. See, e.g., R.A.V. v. City of Saint Paul, 112 S. Ct. 2538 (1992).

n178. Lawrence, supra note 27, at 467 & n.130.

n179. See, e.g., Delgado & Stefancic, supra note 27; Matsuda, supra note 27; Lawrence, supra note 27.

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B. Judicial Review Serves Democratic Ends

There are several ways in which this point is made. All seem to agree that binding judicial review is most appropriate to ensure universal access to the ballot; a necessary prerequisite for a legitimate democracy, but one that affords only an extremely narrow scope for such review. I do not discuss this justification since I have no quarrel with judicial review so limited. n180

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n180. It is, however, true that nonjudicial fora were more hospitable to women seeking the vote than judicial fora. See supra text accompanying note 95. But the decades and decades of enormous effort put into winning the vote for women in the end achieved little beyond the vote itself. It seems unlikely that much is lost when courts enforce voting rights, though executive and congressional action is likely to be more effective. See Rosenberg, supra note 135, at 57-63.

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Perhaps judicial review serves democratic ends by eliminating some of the agency problems associated with electoral politics, particularly elected officials' tendency to act contra to the majority in their own self-interest

and to serve best the interests of those who contribute most to campaigns. n181 Whether judicial review serves these democratic ends is an empirical question. And on issues important to women, the empirical evidence, discussed earlier, suggests that federal judges are less accountable to women than are legislators. This makes sense. Federal judges and state and federal legislators are overwhelmingly male, with interests and perceptions often at odds with women's. The relevant difference is that legis [*1024] lators must compete for women's support; judges need not. Judicial review is therefore unlikely to eliminate agency problems for women.

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n181. See Akhil Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043 (1988).

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One modern justification, as many commentators have argued, is that judicial review of government restrictions on speech are particularly important for democratic reasons: vigorous debate in the marketplace of ideas will serve democratic goals by giving voters information about various options. Another is Ackerman's theory of democratic moments establishing constitutional principles: judges are simply enforcing the rules of higher law agreed to by the people in a constitutional moment. n182

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n182. Ackerman, supra note 5. I discuss in detail Ackerman's presentation of this justification. Elster gives a similar one, noting that citizens can bind themselves to a constitution in order to protect themselves from subsequent folly or error. The difficulty with this way of putting the point is the same as the difficulty with Ackerman's: women did not so bind themselves.

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1. Free speech: promoting vigorous political debate.

Many scholars today argue that the Free Speech Clauses of the First Amendment are designed to, and should be interpreted as, fostering a marketplace of ideas where vigorous debate on important issues takes place in a democracy. n183 There is considerable tension between this purpose and the very notion of binding judicial review, however, since binding judicial review itself degrades political debate by taking important issues and principles off the political agenda. It may well be, as Bickel and Thayer suspected, that there would be more informed and vigorous political debate were there no binding judicial review. It is, for example, exceedingly difficult to engage in public debate about pornography without becoming completely bogged down in the constitutionality of regulation in light of specific Supreme Court decisions. That becomes the important (and often the only) question.

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n183. See, e.g., Calabresi, supra note 1, at 113; Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

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Democratic deliberations are also degraded by the poor quality of judicial decisions, which often are inconsistent with clear thinking and hide the ball. Consider, for example, the Supreme Court equality decisions, discussed earlier, which obscure the conflict between eliminating rules consistent with traditional sex roles and adequately protecting women who continue to regard children as primarily their responsibility.

The greatest weakness with this justification-that binding judicial review is necessary for political speech-is that, as Schauer [*1025] and Balkin have noted, free speech is increasingly conservative, a doctrine that protects the speech of the powerful, including pornographers, racists, and other powerful actors. n184 Free speech has become a formal right, and as such will increasingly be conservative, reinforcing the power of the powerful rather than fostering either rigorous dissent or a system in which all citizens are able to speak. For example, campaign finance reform, which many see as a necessary prerequisite for both meaningful democracy and quality democratic deliberations, is limited by "free" speech cases. n185

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n184. See Schauer, supra note 27; Balkin, supra note 27.

n185. See Schauer, supra note 27; Balkin, supra note 27, at 378.

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Thus far in this section, I have considered various forms of the political speech-enhancing justification for binding judicial review. None is very compelling if such review harms women, a majority group much of whose political speech has for too long been missing from democratic deliberations.

2. We the people acting in a constitutional moment.

The difficulty with this argument, if used to justify judicial review in the face of the problems it poses for women, is that women, though a majority group, did not participate in the relevant constitutional moments. Most women have only been able to vote on constitutional issues since the ratification of the Nineteenth Amendment in 1920. Since then, amendments have been fairly technical and of little importance to women. n186 Women were excluded entirely from the drafting of the original Constitution and Bill of Rights and were only rarely admitted to significant discussions. n187 Indeed, at these most basic of constitutional moments, women were not permitted to speak in public. n188 The one woman, Mercy Otis Warren, known to have published a pamphlet on the [*1026] Constitution while its adoption was being considered, published anonymously n189 and opposed judicial review as dangerous because unbounded. n190

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n186. Amendment 20 provides certain terms and sucessorship for the President, Vice President, and Congress; Amendment 21 repealed prohibition; Amendment 22 limits the term of the President; Amendment 23 gave the District of Columbia the right to representation in the electoral college; Amendment 24 gives citizens

the right to vote in federal elections despite failure to pay taxes; Amendment 25 provides for a successor for the President or Vice President in cases of removal, death, or incapacity; Amendment 26 gives the right to vote to those 18 or older.

n187. As Akhil Amar has noted, "in the debates over the Constitution and Bill of Rights, only one woman-Mercy Otis Warren-had participated prominently, and even then under a pseudonym." Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992).

n188. This was, of course, a matter of social practice rather than legal right. Women first spoke in public in significant numbers during the early decades of the abolition movement. Flexner, supra note 93, at 41.

n189. The pamphlet seems to have been originally "signed" by a "Columbian Patriot." See table of contents entry for "Gerry, Elbridge." Observations on the New Constitution, and on the Federal and State Conventions By a Columbian Patriot, in Pamphlets on the Constitution of the United States Published During Its Discussion by the People 1787-1788, at 2 (Paul Leicester ed., 1988) (page 4 is the first numbered page in main body of book; one reaches page 2 by counting backwards from 4). Until recently, historians attributed the pamphlet to a man, Gerry Elbridge. See Janis L. McDonald, The Need for Contextual ReVision: Mercy Otis Warren, A Case in Point, 5 Yale J. L. & Fem. 183, 185 n.5 (1992) (explaining that the pamphlet attributed by early histories to Elbridge Gerry was by Mercy Otis Warren).

n190. See Gerry Elbridge, Observations on the New Constitution, and on the Federal and State Conventions By a Columbian Patriot, in Pamphlets on the Constitution of the United States Published During Its Discussion by the People 1787-1788, at 4 (Paul Leicester ed., 1988):

> There are no well defined limits of the Judiciary Powers, they seem to be left as a boundless ocean, that has broken over the chart of the Supreme Lawgiver, "thus far shalt thou go and no further," and as they cannot be comprehended by the clearest capacity, or the most sagacious mind, it would be an Herculean labor to attempt to describe the dangers with which they are replete.

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Ackerman's constitutional moments are not, however, limited to formal amendment processes. Women might be considered to have participated, in some sense, in both the Reconstruction and New Deal moments, and women could actually vote at the later moment. But neither of these moments focused on extending binding judicial review for speech, sex equality, or fundamental rights. Indeed, the scope of contemporary review in these areas was unforeseeable at those moments.

In addition, the reconstruction amendments, over the vigorous objections of many women activists, extended the vote only to African American men. In so doing, also over the objections of many women activists, the word "male" was added for the first time to the Constitution. n191 Although the Privileges and Immunities Clause of the Fourteenth Amendment may have been understood by its drafters as guaranteeing certain rights for all, including women, subsequent judicial decisions denied any such effect. n192 Women's informal and

ineffective participation in a process from which they [*1027] were formally excluded cannot be a basis for inferring consent to binding judicial review.

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n191. Section 2 of the Fourteenth Amendment provides for representation according to the number of male citizens in a state. U.S. Const. amend. XIV, 2.

n192. See Nina Morais, Sex Discrimination and the Fourteenth Amendment: Lost History, 97 Yale L.J. 1153 (1988); Sandy Rierson, Race and Gender Discrimination under the Fourteenth Amendment: A Case for Equal Treatment (unpublished article) (on file with author); John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385 (1992).

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Furthermore, no participant in the Reconstruction moment could have guessed at the current scope of binding judicial review. For example, at the time of Reconstruction, the Supreme Court had never struck a statute as unconstitutional under the Free Speech Clause of the First Amendment. n193 Further, the proponents of the equality provision of the Fourteenth Amendment could not have foreseen that the right to equality would always be trumped by the speech clause of the previously-enacted First Amendment.

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n193. The first case was in 1931. See infra note 194 and accompanying text.

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The New Deal moment, focused as it was on the elimination of judicial review in the context of market regulations can hardly legitimate judicial review in other contexts. More particularly, the focus of that constitutional moment was not on extending judicial review for sex equality (the first case was 1971), free speech (the first decisions holding unconstitutional governmental action and doing so squarely on the First Amendment had just been decided n194), nor abortion (Roe v. Wade was decided in 1973 n195). Indeed, the scope of current review in these areas would have been unimaginable to most people at the time. Thus, the New Deal adjustment does not justify judicial review in the areas of particular concern to women.

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n194. The first case was Stromberg v. California, 283 U.S. 359 (1931). The thrust of the early cases was not today's formal and conservative libertarian right to free speech, but instead a "rich public debate" theory of the First Amendment. See Daniel Hildebrand, Free Speech and Constitutional Transformation, 10 Const. Commentary 133 (1993).

n195. 410 U.S. 113 (1973).

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Ackerman does not, of course, argue that women were included in any constitutional moments or that the current scope of binding judicial review

for free speech or sex discrimination could have been foreseen at in any constitutional moment. The latter point he seems to avoid entirely. Instead, he seems to give two reasons why women and minorities should be considered bound by constitutional moments from which they were excluded. The first begins with the statement that the "old-timers provided a constitutional language and institutions through which later generations of women and blacks have won fuller citizenship." n196 This is, of course, true; but that things might have been worse-so that women and African Americans might have been excluded from citizenship for hundreds of years after the founding-cannot legitimate a constitutional process from which they were excluded, however.

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n196. Ackerman, supra note 5, at 316.

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Ackerman follows this initial sentence with the assertion that "neither the women's movement nor the civil rights movement has sought to repudiate the country's higher law making heritage." n197 Indeed, both groups "used the inclusionary potential of this tradition to advantage." n198 Of course these movements worked within the system to some extent. And many of the leaders of both movements thought that Supreme Court review would advance their cause. In this belief, they may well have been wrong. I speak from the perspective of a second generation; n199 the difficulty of seeing initially the problems that might arise is quite understandable. These uncertainties reinforce my pragmatic objection to binding judicial review and may thus seem to strengthen the case against it: it is quite difficult to know, without trial and error, what will work and what will not work when attempting to change social inequalities. And trial and error is much more easily done with nonbinding judicial review given judicial commitment to precedent, a commitment grounded in large part on the need to preserve the judiciary's own legitimacy rather than the needs and interests of those whose "rights" the Justices are determining. n200 That many of the leaders of the women's and civil rights movements did not see these problems in advance would not legitimate a system whose structure preserves political dominance of a democracy by a minority group of white men. n201

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n197. Id.

n198. Id.

n199. Cf. Williams, supra note 117.

n200. See Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

n201. Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

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Moreover, the leaders of the women's movement did not represent all women. Their interests were often in sharp conflict with the interests of ordinary and minority women on the key question of how to approach sexual inequality, as

many recent feminist commentators have pointed out. And the standard they, with only partial success, n202 urged on the Court serves their interests better than the interests of many ordinary and minority women, women who are less likely to be similarly situated to men. n203 That some leaders of the feminist movement tried to use judicial review cannot be a basis for finding consent by all women no matter how disparate their interests.

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n202. See supra text accompanying notes 131-33.

n203. See Becker, supra note 77; Becker, supra note 13.

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Ackerman has a second response that begins with a statement suggesting he does see the problem in light of the exclusionary [*1029] nature of the key constitutional moments and binding judicial review's potential to block needed legislative reform by outsider groups:

> even if oppressed social groups could gain a normal political victory at the polls, [binding judicial review requires that] .... rather than proceeding immediately to social reform, ... the ascendant coalition would have to confront the resistance of the courts, and other preservationist institutions, if their program strikes at the heart of traditional constitutional values. n204

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n204. Ackerman, supra note 5, at 317.

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But Ackerman's answer is wholly nonresponsive; I quote it, in its entirety, in the margin. n205 Nowhere does Ackerman seriously consider the possibility that binding judicial review in discrimination [*1030] and speech cases might hurt women (or minorities). n206 Nor does he ever consider the many important differences between the complexity of sexual equality and the relative simplicity of the issue in Lochner, n207 at least as framed by the Court. In short, Ackerman's constitutional moments cannot eliminate the countermajoritarian objection if a majority of citizens were excluded from the creation of a structure that to this day allows a minority group to dominate political life.

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n205. Id. at 316-17:

> It strikes me as facile to suppose that social justice will come to America in a single burst of lawmaking that follows a single electoral victory.... I believe that dualism [a combination of binding judicial review under constitutional principles and the ability of We the people to modify the Constitution in constitutional moments] is far sounder in its instincts. Lasting progress will require an extended period of citizen mobilization through which reformers confront the doubts of their fellow Americans and win the consent of many, if not all, to the need for fundamental change in the name of justice.

I do not understate the magnitude of the task. At no time since the 1920's has the movement for social justice in American been as fractionated as today. Rather than bonding with one another, the labor movement and the peace movement, blacks and ethnics, feminists and environmentalists, look upon each other with anxiety and suspicion. The very thought they might find common ground-much less common ground with more mainstream Americans-seems to many a vain illusion. But is it an illusion that we cannot afford to live without.

There can be no knock-down answer to this question. I have been trying to reassert the revolutionary promise of the constitutional tradition, not guarantee its performance-which will depend on lots of things beyond our power to predict or control.

But it will also depend on us. We may reach out to one another-across the lines of class and caste and race-and work together to build a more just foundation for our life together; or we may not. Our generation may be numbered amongst those that found meaning in the work of private citizenship; or we may hand down to our children a history in which the constitutional achievements of the past become ever more distant, the distractions of normal politics ever more present, the call for a new exercise in common citizenship ever more hollow.

All I know is this: Americans have in the past answered this call and have successfully worked together to build a community more inclusionary and more just than the one they entered. There is no reason to say that this history has come to an end.

Nowhere in this passage does Ackerman offer a single justification for binding judicial review in sex discrimination or speech cases assuming countermajoritarian effects on a majority group excluded from the key moments of "higher law" making. That lasting progress will not be accomplished with a single set of legislative changes after a single election is wholly irrelevant. That progressive coalitions are difficult to build even when a mere majority is required cannot justify making the task more onerous by requiring a supermajority in a constitutional moment. That "we" could "reach out to one another" (in a new constitutional moment?) is also irrelevant. If, in fact, binding judicial review is countermajoritarian in that it tends to keep women, a majority, in second class status, none of these points can justify the practice.

n206. See supra notes 47-50, 82-90, 116-36 and accompanying text.

n207. Freedom of contract would be an exceedingly complex issue from a progressive perspective, were courts to determine how to achieve real freedom of contract in light of differential bargaining power.

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At this point, I have considered both the arguments against and for binding judicial review from the perspective of women. The case for judicial review is weak, at best, for all cases involving sexual classifications and speech. I think it likely that binding judicial review in these areas has, overall, been bad for women; women would be better off today, both in terms of their levels of representation in legislative bodies and in the real world, were there no binding judicial review in our system of government.

Binding judicial review even for abortion rights has had disadvantages as well as advantages for women, hurting some women, sometimes, in some ways, in some situations and helping some women, sometimes, in some ways, in some situations. Whether binding judicial review in this area has hurt women is unclear; even less clear is whether reversal of Roe v. Wade at this point, after twenty years of judicial interference, would be a good thing for women.

Thus far, my discussion has been fairly abstract. I next turn to a specific speech issue, in order to make many of these points more concretely and with less ambiguity.

III. University Speech: A Case in Point

As noted in the introduction, n208 these cases are ideal for an academic to use in evaluating binding judicial review for three reasons. First, all the action is state action when public universities regulate speech, whether through grades, hiring and tenure decisions, or the other routine assessments discussed below. Thus, the inquiry is not confounded by the public-private distinction, one which tends to keep issues important to women beyond the scope of what is [*1031] perceived as government action (and hence beyond the scope of effective judicial review for apparently sound, neutral reasons). Second, academics know how universities really work, a necessary prerequisite to spotting regulation of speech by any entity. To the extent regulation is embedded in traditional practices in subtle ways, it will be difficult or impossible for an outsider to perceive speech regulation in an institutional setting. Third, this is a small and manageable area in which to assess the effects of judicial review, one in which it is possible to reach firm conclusions (in contrast to areas as broad as abortion, sex equality, and free speech in general).

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n208. See supra text accompanying notes 8-9.

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As other scholars have noted, free speech is today conservative in a number of ways. For example, free speech is conservative because it is only a negative right, protecting the speech of those with the resources to speak. n209 Free speech is conservative because only the government is bound by this important constitutional provision. Powerful private actors, such as the media, are free to distort and suppress the speech of others and do, yet political processes cannot be used to correct such distortions or suppressions. To the extent groups subordinated by private speech have greater access to government than to the media, free speech is conservative. n210 Free speech is conservative because judges worry about chilling powerful pornographers, but not at all about the chilling pornography causes. n211

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n209. See Schauer, supra note 27; Balkin, supra note 27; see also Owen M. Fiss, Why the State?, 100 Harv. L. Rev. 781 (1987).

n210. Cf. Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation, 56 Tenn. L. Rev.

291, 313 (1989) ("Which is worse-to leave pornographers subject to the vicissitudes of silencing by the lawmaking activities of political majorities, or to leave women subject to the vicissitudes of silencing by the private publishing activities of pornographers?").

n211. Id.

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Yet, free speech is conservative in a more basic sense when enforced by judges. Even when all the action in the area is state action and only relatively privileged people-those able to attend universities-are involved, federal judges cannot see free speech claims when power is exercised in traditional ways. The implications for women and racial minorities are clear: speech claims are unlikely to be available to them when they are discriminated against by universities because of the content of their speech, yet courts are likely to bar attempts to protect them as new entrants to university communities from which they have traditionally been excluded.

There is a second problem with binding judicial review when considered in light of the Supreme Court's recent embrace of a no- [*1032] viewpoint regulation approach to speech cases: n212 the viewpoint fallacy. Judges, like other human beings, lack the ability to see what is viewpoint discrimination and what is not. We do not perceive as "viewpoint" perspectives that we take for reality, though we might see it when an entity acts in new, nontraditional ways. Given the need for new solutions if we are to end systemic subordination of women, limitations on viewpoint regulation by government powerfully support the status quo of male domination.

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n212. R.A.V. v. City of Saint Paul, 112 S. Ct. 2538 (1992).

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In recent years, a number of universities, public and private, have adopted speech codes of various sorts designed to protect women and other groups targeted for harassment on their campuses. There is no Supreme Court case squarely on point, but dicta in R.A.V. n213 suggests that the current Justices would strike any such code in a public university. n214 In the lower federal courts, such codes have tended to fall because they regulate speech in terms of content, that is, whether it is racist or sexist, whether it harms women and minorities. n215

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n213. Id.

n214. Everyone seems to agree that private universities are free to restrict speech as they wish since the Constitution does not apply to them.

n215. See Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (holding policy unconstitutional as a violation of free speech; although University argued that its policy did not apply in the classroom, court stresses possibility that it might be applied in classroom discussions); UWM Post, Inc.

v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991) (similar holding; again, University argues that the rule would not apply in the classroom); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 773 F. Supp. 792 (E.D. Va. 1991) (discipline of fraternity for out-of-classroom event, including "dress a sig" event in which a member dressed in black face, with pillows for breasts and buttocks, and wore a black wig and curlers, held unconstitutional).

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At first, this result might seem inescapable. We think of universities as places created for exploration of all sorts of ideas in a free and open atmosphere. But closer consideration of the functions of universities reveals that this initial reaction is naive. Although an amazing number of authors have written articles on the constitutionality of speech codes, only Stanley Fish actually describes realistically what it is we in universities do. n216 As Fish points out, if universities "were only places to encourage free expression ... it would be hard to say why there would be any need for classes, or examinations, or departments, or disciplines or libraries, since freedom of expression requires nothing but a soapbox or an open [*1033] telephone line." n217 But universities are committed to "the investigation and study of matters of fact and interpretation." n218 As such, concludes Fish, "the flourishing of free expression will in almost all circumstances be an obvious good; but in some circumstances, freedom of expression may pose a threat to that purpose, and at that point, it may be necessary to discipline or regulate speech...." n219

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n216. Stanley Fish, There's No Such Thing As Free Speech and It's a Good Thing, Too, in Debating P.C.: The Controversy Over Political Correctness on College Campuses (Paul Berman ed., 1992).

n217. Id. at 237.

n218. Id. at 238.

n219. Id.

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I want to expand on Fish's basic point, showing that the essential business of a university is the regulation of the content of speech. I use this point to argue against binding judicial review of university speech codes on the ground that such review is conservative, tending to protect the status quo rather than protect free speech much, since countless regulations of speech by universities-in particular, conservative understandings of what is knowledge, of what is quality scholarship or analysis, and so on-are not recognized as regulation of speech and hence not judicially reviewable.

I begin by describing some of the ways in which universities regulate speech. Universities are institutions that attempt to advance our understanding of the world around us and of ourselves. They are not simply places where speech is valued in itself; it is quality speech that is valued, and it is valued for its quality, its content, its viewpoint. These institutions define what counts as

knowledge, as important, relevant to the world and the human condition. Inevitably, such assessments regulate speech in terms of content, viewpoint, and even ideology. Indeed, that is the whole point: to promote quality speech as quality is understood within the relevant academic community or by the relevant administrator (or both).

Such assessments inevitably turn on content, viewpoint, and ideology. For example, all American universities suppress the viewpoints that the earth is flat and that the universe revolves around it. Often speech about issues important to women and minorities is regulated (suppressed) because those doing the assessing value the content or viewpoint as low: the problem addressed is considered trivial or the methodology suspect. n220 Often, in law, women's issues are not regarded by powerful men as "intellectually interesting," in contrast to the issues they are interested in. Women and minorities [*1034] engaged in feminist or critical race research may lose hiring and promotion opportunities because of the content of their speech, their viewpoints, and ideologies. For example, among legal academics, narrative approaches, such as those employed by many feminists and critical race scholars, are considered of little value by many powerful people at many schools, including state universities. n221

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n220. Cf. Catharine A. MacKinnon, Toward a Feminist Theory of the State 162-232 (1989) ("social circumstances, to which gender is central, produce distinctive interests, hence perceptions, hence meanings, hence definitions of rationality").

n221. For a discussion of how scholarship might differ-along ideological as well as other lines-were there more minority law professors and the political implications of such differences, see Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 Duke L.J. 705.

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Various disciplines have varying, and often inconsistent, norms about viewpoints, including political viewpoints. For example, an expressly political orientation is required in some disciplines at some universities (for example, english departments) and forbidden in others (for example, many history departments require an apolitical stance). Scholars trying to cross disciplinary boundaries may face inconsistent requirements, and this may be particularly true for members of groups traditionally excluded from universities, who may find current disciplinary boundaries an artificial barrier to the kind of intellectual work they find most valuable.

Of course decisions on hiring and promotion of faculty regulate speech. This is the most important and effective way in which an academic institution regulates speech. Much academic speech, particularly in classrooms, student papers, and exams, depends on who is hired. Speech at a law school without any critical race theorists will be different from speech at a law school with several. And hiring and tenure decisions are based on assessments of the quality of the content of the applicant's speech, the quality of the applicant's arguments, research, methodology, and, inevitably (especially at the margins of academic discourse within any discipline), viewpoints.

Regardless of content, no university offers every possible course. Course offerings are selected according to the content that students are to be exposed to. Available courses may skip topics students, particularly women and minorities, consider important; we have all heard of criminal law courses that do not cover rape. Perhaps (as at the University of Chicago), there is not a women's studies department. There may be strong arguments on both sides of whether to have a department devoted to women's studies, but these arguments are based on and reflect viewpoints and ideologies. They depend on the speaker's assessment of the content and viewpoint likely to be promoted by a women's studies department. [*1035]

In classrooms, women and minority students often have issues they consider important dismissed by a professor who considers such issues irrelevant. And there are myriad unwritten (because every one understands them since they reflect conventional expectations) rules about what is appropriate matter in a classroom discussion. Such understandings are not made blindly; viewpoint and ideology are inevitably relevant.

Papers and written exams are graded in terms of the professor's assessment of the content of the student's knowledge and quality of her or his reasoning or creative ideas. n222 If the paper or exam contains the sorts of knowledge and insights the professor considers valuable, even if he n223 does not agree with them, it might seem that the grade is for quality irrespective of viewpoint or ideology. But that is only because the professor's beliefs (viewpoints, ideologies) include a range of valuable approaches (though he may not agree with them all). But if the student's paper or exam had been based on a viewpoint or ideology the professor considered stupid, irrelevant, irrational, superstitious, or evil, the importance of viewpoint and ideology to evaluating content would be obvious. Imagine, for example, that you are grading an essay question on gradations of punishment for various forms of rape. And imagine that the exam you are reading argues that rape should be legal, indeed rewarded, because women enjoy rape; rape is therefore a good thing. You should be affected by the exam's viewpoint, content, and ideology in assigning a grade to it.

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n222. There are countless reports from lesbians, gay men, racial minorities, and other women about bias in judging their work because of their perspectives and viewpoints. See, e.g., Mario DiGangi, Promoting Diversity, GSAS News, Spring 1993 (inter alia, students feel a need to take feminist and gay-lesbian analysis out of their essays and papers).

n223. I use "he" deliberately since most professors are male, particularly full professors likely to be most powerful in deciding hiring, tenure, and promotion of others. See Anthony DePalma, Rare in Ivy League: Women Who Work as Full Professors, N.Y. Times, Jan. 24, 1993, at 1 (percentages of full professors who are women at various schools include Brown (9%); Columbia (13%); Harvard (11%); Pennsylvania (11%); and Yale (9%)).

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Graduate students are discouraged from dissertation topics their advisors consider inappropriate or uninteresting. Whether such advice is helpful or harmful, it regulates speech in terms of content. A colleague recalls that, in 1968 when she was selecting a topic for a Ph.D. in political science, she

wanted to analyze the treatment of women in Western political theory (something along the line of Susan Moller Okin's well-respected first book n224) but was discouraged [*1036] from doing so by her thesis advisor. He did not regard the topic as the "stuff" of which Ph.D. dissertations are made. Okin is now a professor of political science at Stanford. Discouraging a student from pursuing such a topic is regulation (indeed, suppression) of speech because of its content, viewpoint, and ideology.

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n224. See Susan Moller Okin, Women in Western Political Thought (1979).

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The sorts of regulations described in the preceding paragraphs are endemic in academic institutions. Indeed, one could make the same points without any reference to women or minorities: the essential business of the university is to promote quality speech (however that is defined) and to suppress low-quality speech.

Thus, traditional, unspoken, rules and understandings about what speech is high quality permeate university life and turn on content and viewpoint. The boundaries of every academic conversation, as well as many of the assessments of quality within the boundaries, turn on questions of content, viewpoint, and ideology. This is not to deny qualitative differences between various kinds of academic speech. Rather, the point is that assessments of quality, whether one agrees or disagrees with those assessments, inevitably turn on content (that is always obvious) and turn as well (and this may be obvious only at the boundaries) on one's viewpoint and ideology.

Further, these assessments, grounded as they inevitably are in traditional notions of what a discipline is about, what counts as "truth," and what methods are most valuable, often hurt women and other newcomers to university communities because many of these new entrants do look at and value things differently. Indeed, often the value of their speech lies therein. But, of course, many powerful people with more conventional perspectives and interests do not agree. All too often, therefore, such assessments suppress or undervalue speech that is important to women and minorities.

Yet no court would entertain a constitutional challenge under the Free Speech Clause grounded in the allegation that a public university's consideration of the content of speech in any of these routine ways-in setting courses, syllabi, evaluating a scholar for hiring or promotion-was unconstitutional. n225

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n225. In two recent cases, lower federal courts have held unconstitutional unusual public university reactions to racist speech. See Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992); Jeffries v. Harleston, No. 92-4180KC, 1993 U.S. Dist. LEXIS 6418 (S.D.N.Y., May 11, 1993).

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What is different about speech codes? Perhaps it is that they are explicit. But many of these other content-based judgments are also explicit. Course

offerings and syllabi are explicit. Students are often given feed-back on exams and papers, feed-back that explicitly [*1037] values their work in terms of its content, noting what was "wrong" and what was "right" about their speech.

Perhaps speech codes are different because they are negative, ruling certain kinds of speech out of bounds. But many of the regulations of speech that I have described, none of which receives a constitutional remedy, are also negative. Convincing my colleague not to do a dissertation on women in Western political theory is negative and explicit (though not written). Feed-back on an exam or paper may be negative and explicit and even written: "I took off points because you said x, y, z, when a, b, c is true, more logical, more convincing, or more relevant." The decision to exclude certain texts from the core canon is negative.

Perhaps routine university assessments are different because they rate content in terms of quality independent of viewpoint or ideology. But, as suggested earlier, at the margins of what the grader considers appropriate discourse in this academic context, content and viewpoint will inevitably be determinative. For example, I doubt that any student answering the criminal law exam described earlier with a defense of rape would do very well. Professors in an English literature course are not likely to highly value an essay asserting the viewpoint that this canon is without any artistic or redeeming social value and says nothing about the social order from which it sprang. A professor who is a Marxist and a professor who believes in free markets are likely to have different assessments of the quality of the same exam or paper, and this is likely to be true even if they try as hard as they can to judge its worth independent of their own commitments and even if the paper is within the range of discourse they consider appropriate. People with different viewpoints or ideologies often seem to have missed a key point or not to have appreciated its importance and relevance. Inevitably, assessments turn on viewpoint and even ideology.

The courts striking campus speech codes purport to do so because such codes regulate content, period. None mentions a defense of "but this is a quality assessment." And speech codes do regulate based on assessment of the quality of racist or sexist speech. Proponents of such codes consider the intellectual quality of such speech low in terms of academic contributions, just as graders of exams grade in terms of their assessments of the quality of speech.

For example, the University of Wisconsin code struck by a federal district court, n226 regulated

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n226. UWM Post v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991).

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racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals ... if such comments, epithets or other repressive behavior ... intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and

2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity. n227

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n227. Id. at 1165.

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This code assesses racist, sexist, and similarly offensive speech in terms of its quality in the context of an academic community. As the University argued in court, such speech "is unlikely to form any part of a dialogue or exchange of views." n228 The guide to the code also illustrates this point. Consider:

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n228. Id. at 1175.

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Question 1: In a class discussion concerning women in the workplace, a male student states his belief that women are by nature better equipped to be mothers than executives, and thus should not be employed in upper level management positions. Is this statement actionable under proposed UWS 17.06(2)?

Answer: No. The statement is an expression of opinion, contains no epithets, is not directed to a particular individual, and does not, standing alone, evince the requisite intent to demean or create a hostile environment. n229

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n229. Id. at 1166.

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Similar assessments of speech quality occur continuously in university settings. Speech that is considered irrelevant to serious academic discussion is ruled out of bounds, implicitly or explicitly, by teachers running classroom discussions, grading exams, papers, considering dissertation topics, etc. Indeed, routine assessments go further than the Wisconsin code, since professors often react negatively (with a dismissive or even humiliating comment in class or a low grade on a paper or exam) to statements of opinion considered stupid, irrelevant, or mistaken, etc., such as the comment in question 1, above. Furthermore, speech codes can be part of a good education, teaching students important principles of tolerance and respect for all members of university communities.

It is true that speech codes are based upon both assessments of quality speech in an academic setting and of the harm of homophobic, racist, or sexist speech. But universities routinely take [*1039] into account the harmful effects of speech at faculty hiring. Often people (usually women, scholars of

color, or critical scholars) are not hired because they are viewed as too strident and descriptive of "colleageality," that is, their speech is harmful.

Perhaps it is the disciplinary nature of proceedings under the speech codes that makes them different from routine assessments of speech by public universities. But rude dismissals of student comments in a large class can be quite demeaning and humiliating. And low grades can lead to precisely the same sorts of negative events disciplinary proceedings can lead to: probation, suspensions, or expulsion. Often, disciplinary proceedings lead to far less serious events: an apology, viewing a video on racism, or moving to a different dorm. n230 It is true that low grades may lead to academic probation or expulsion whereas a disciplinary proceeding may lead to disciplinary probation or suspension, but why this distinction should matter is not obvious. No court considering a university code has regarded this distinction as relevant in any way. n231

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n230. See, e.g., id. at 1167-68.

n231. See Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); UWM Post, Inc. v. Board of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991).

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Perhaps the difference is that codes are policies set at too high a level. But many of the routine regulations of speech are also set at high levels: what will comprise the key components of the canon for the common core (required for all undergraduates); what will comprise the key components of the canon in various contexts; what courses will be offered; whether there will be a women's studies department; whether a department's recommendation on hiring or promotion will be given effect or overruled. Many of these decisions are made at a high level or even the highest level. Many are also explicit written policies that judge speech by content. Yet none could give rise to a constitutional claim by a student or member of the faculty not able to read or engage in the speech they value.

Courts could, of course, adopt a rule that public university regulation of speech must always be at the lowest possible level, to foster free speech. Thus, the regulation of speech in one way by one professor can be offset by the regulation of speech another way by another professor. Under a micro-only approach, professors (once hired? once tenured?) would be free to teach whatever they wanted. There would be no canon nor higher-level decisions about course offerings. Promotion and hiring decisions would be made at the department level (assuming funds were available for the slot); [*1040] higher administrators or committees would not be able to review these departmental decision and overrule them.

Such an approach would have advantages for women, minorities, and other newcomers to university communities (such as "out" lesbians, bisexuals, and gay men). They would, once hired, be free to teach whatever they wanted unbound by traditional notions of what their discipline is about and what students "need" to know. Departmental hiring and promotion decisions are most likely to be overruled by higher decisionmakers when scholars who look marginal are under

consideration, and women, minorities, and other newcomers (especially if interested in new issues and approaches) are most likely to look marginal. A rule banning final hiring and promotion decisions above the departmental level would, therefore, also be good for women and other outsiders.

But these changes are simply unimaginable. They would not seriously be considered for a moment. Our commitment to only "micro" regulation of speech is not all that deep.

Perhaps speech codes are different because they regulate speech outside classrooms as well as within them. But the learning experience, centered in the classroom, is the central concern of university life. All else is ordered so as to create the appropriate learning environment, and the core of that environment is the classroom itself. If speech codes advance classroom learning, by minimizing harassing speech which interferes with learning while contributing little or nothing to an academic discussion, then such codes are justified by the central mission of the university, the successful transmission of learning, the same mission that justifies regulation of speech within the classroom.

Moreover, unless the speech takes place in a non public arena, such as someone's dorm room or a meeting room reserved by a particular student group, n232 one person's free speech in a "public forum"-for example, yelling racial or sexual epitaphs at persons of a another race or sex-makes another person a "captive audience" to speech they find objectionable, hurtful, and incompatible with an environment conducive to successful learning. The right to free speech should not include the right to coerce others within a university community to listen to such speech.

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n232. Widman v. Vincent, 454 U.S. 263 (1981).

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What seems different about the speech code cases is that those codes protect new entrants to academic communities in nontraditional ways. Therefore the regulation in terms of content is visible [*1041] as such and seems unusual. Therefore the courts are willing to consider constitutional challenges to content discrimination. Therefore the content discrimination seems inappropriate and inconsistent with our idea of the university.

In fact, free speech arguments can be advanced on both sides in the speech-code cases. One could regard public university faculty as protected from judicial review by a notion of academic freedom and university autonomy grounded in the free speech clause of the first amendment. One could regard, as within the peculiar competence of these faculty, and beyond the competence of federal judges, assessments of speech and speech codes themselves for academic quality and educational value. Under this approach, concerns for free speech would cut against judicial review, leaving academic communities to define quality speech independent of federal judicial oversight.

This approach has been taken in Title VII challenges to academic hiring and promotion decisions at public as well as private universities. Although Title VII bans discrimination in employment on the basis of sex and race, women and minorities who have attempted to bring Title VII challenges to university

evaluations of the content of their speech have found the federal courts less, not more, willing to review content-based university assessments of speech than similar decisions by other employers. Indeed, some courts-without any support in the language or legislative history of Title VII-have refused to order an award of tenure in discriminatory promotion cases, because that would be too great an interference with university autonomy and academic decisionmaking! n233 Plaintiffs before such courts are limited, regardless of the strength of the showing of discrimination, to reinstatement pending "good faith" reconsideration of the tenure decision. n234

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n233. See, e.g., Guzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988).

n234. This set of cases provides another illustration of how women are likely to be better off before legislative bodies. It is good that these strange interpretations of Title VII can be corrected by Congress. Women could only be worse off were these holdings constitutional.

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What is the difference between the speech code cases and these cases? Why do federal judges feel competent to second-guess university officials in one situation and not the other? Why do speech concerns argue for striking speech codes rather than for leaving universities free to assess quality of racist and sexist speech just as they are free to assess quality of other speech, even when their assessments may violate Title VII? Again, courts seem unwilling to review speech assessments that exclude new entrants in light of [*1042] traditional understandings of quality but are willing to review assessments of quality of speech in speech codes that protect new entrants in nontraditional ways.

There are, of course, good reasons why federal courts might be reluctant to get embroiled in every assessment of the content of speech by a public university. Imagine that every grade or professor's response in class or elsewhere to the content of speech is regarded as potentially a violation of the Constitution and freely reviewable. How could the judge grade or assess scholarship for tenure purposes without reference to content? What would the judge look at?

Neither the federal courts nor public universities could survive in any recognizable form were federal courts actually to ban content or viewpoint discrimination in all assessments of speech. But if federal courts do not review grades, syllabi, tenure decisions, decisions not to have a women's studies department, not to offer courses in feminism, etc. they should not review speech codes. All these assessments involve considerations of academic quality and should either be beyond or within the competency of the federal judiciary. Any other result will be, not neutrality, but judicial protection for traditions that often disadvantage and discriminate against women and racial minorities while denying similar deference to content-based decisions that protect women and other newcomers to academic communities. n235

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n235. Under this approach, Widmar v. Vincent, 454 U.S. 263 (1981) (public university must afford meeting space to religious student organization when

such space made available to other student groups), would be seen as a public forum case, not a university-speech case.

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Moreover, many of the objections to judicial review of routine university assessments of speech are principled, not simply pragmatic. One simply cannot assess quality of speech independent of content and viewpoint, as becomes clear when one considers speech at the margins of the evaluator's notion of acceptable academic speech in a particular setting. Evaluating speech in terms of quality is the central mission of the university and it is a worthwhile one. We should not abandon this effort, though we must all strive to hear and appreciate as much as possible the viewpoints of others and question our own. Universities should continue to assess the quality of speech, including speech covered by speech codes and other speech, even though such assessments inevitably turn on content and viewpoint.

Speech codes allow university communities to define themselves in particular ways. n236 It seems likely that not all kinds of speech can [*1043] be simultaneously maximized in any particular community. A community extremely tolerant of extremely conservative speech is likely to silence radical and even liberal speech in subtle and not-so-subtle ways. And vice versa. For example, I have heard women in graduate school complain that they feel less able to articulate their concerns in an institution more open to conservative viewpoints than their undergraduate institutions. And I have heard conservatives complain that liberal institutions similarly silence them.

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n236. Frank Michelman, Universities, Racist Speech and Democracy in America: An Essay for the ACLU, 27 Harv. C.R.-C.L. L. Rev., 349, 356-59 (1992) (making point in context of private universities).

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It may be a good thing that universities, even public universities, can differ from each other (on a university-wide basis), thus offering prospective students a variety of communities with identities and real differences. There may also likely to be a synergistic effect to having certain universities with certain university-wide slants, thus bringing together like-minded faculty who can work together on similar projects and for common goals. Students are not forced to go to any particular university and universities are today extremely competitive. n237

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n237. David A. Strauss, State Action After the Civil Rights Era (draft of a paper for AALS Constitutional Law Panel, 1993) (on file with author).

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There would of course be disadvantages to such an approach, and I am not actually advocating specialized universities. My point is that a case may be made for such universities, and there might even be more varied speech in a world with such universities; why should the question be resolved, for public

universities, by the nine justices on the Supreme Court, rather than by ordinary democratic processes?

Private universities are of course completely free to define themselves in specialized ways and routinely do so. n238 Public universities are disciplined by their very nature as public universities in ways that make hypothetical and objectionable explicit bans on whole categories of valuable academic speech-such as feminist speech or economic analysis or speech by Marxist professors-most unlikely today regardless of any judicial review. And, in any event, there is no reason to consider federal judges more trustworthy than the political processes that produce and operate public universities. Covertly, universities often discriminate today on these bases without any judicial review.

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n238. Consider, for example, the many private religious schools, schools specializing in science or technology, and schools with an informal but discernible bent for market-based approaches (such as the University of Chicago).

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Part of the point, of course, is that in the event of error, and error may certainly occur, participants in political processes are capable of learning and correcting their errors, and are more likely to do so if not "saved" the trouble by binding judicial review. Members of political bodies and ordinary citizens might in the end be more responsible and tolerant if allowed to correct their own mistakes. As Henry Steele Commager noted in the forties: "Is it not reasonable to suppose that majorities, like individuals, learn by their mistakes, and that only the lessons learned by experience make a lasting impression." n239 If only judges learn tolerance, tolerance will remain elusive, since judges can do but little to enforce tolerance throughout society or even universities. This point is especially important because, as noted earlier, previous eras of unusual intolerance have ended as a result of political, not judicial, action. n240

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n239. Commager, supra note 2, at 72.

n240. See supra text accompanying notes 157-58.

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Federal judicial review of university regulation of speech provides a concrete illustration of many of the objections I raised earlier to judicial review. It is countermajoritarian in two senses: (1) it is inconsistent with a policy desired by a large number of people (presumably a majority) acting through nonjudicial governmental institutions; and (2) it frustrates women's efforts to attain equality throughout society, including the political arena, thus preserving the political dominance of a minority group (white men). Sexist language and harassment make it harder for women to succeed in academic life, and such successes (and the internal confidence success in an environment that is not harassing can give) are important credentials for a successful

political life.

The case of binding judicial review of university speech codes illustrates a number of my more concrete points. First, it seems to do a good job of protecting the class, race, and sex interests of those who do the reviewing. As Brest has noted, binding judicial review in speech cases rather clearly reflects the interests of the "reasoning class" more than the interests of the population as a whole, and this is true in the university cases as well one suspects. n241 More particularly, with respect to sex, binding judicial review of university content-based regulation of speech protects the interests of those who harass women and minorities, thus serving the interests of the dominant white male class. This is so, though many other university decisions assess speech in terms of content, often harming women and minorities thereby. But these assessments are not subject [*1045] to any binding constitutional review and receive only the most limited review even under Title VII.

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n241. Brest, supra note 3.

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Second, binding judicial review of public university regulation of speech precludes valuable experimentation. It seems quite likely that some experimentation with various approaches is needed. No one (and no nine) deciding a single case is (or are) likely to come to the ideal solution of how to maximize quality speech for all in every public university community.

Third, binding judicial review in this area has impoverished political speech and democratic deliberations by removing important issues from consideration and focusing attention on constitutional doctrine, which is unusually incoherent and unrealistic here, with the insistence, in the lower courts do date, that public universities not regulate speech in terms of content and viewpoint (though in point of fact, they do it continuously). We need to discuss and consider, as a polity, the serious questions raised by university speech codes: how best to balance the needs of all members of university communities.

The university cases also suggest the futility of looking to the courts for effective enforcement of a desired social outcome. Most university regulation of speech is entirely invisible to the courts. Indeed, even when asked by Title VII litigants to review regulations likely to be discriminating against women and minorities, the courts have fairly successfully declined the invitation.

University speech regulation also suggests that the major justifications for judicial review in the face of the countermajoritarian difficulty are hollow. The first major justification is that courts have more leisure, insulation, ability to make principled decisions than do a majority of the polity. Again, this point rings hollow in the context of judicial review of university content-based speech assessments. Courts see the first amendment as insulating from any judicial review university assessments in selection of courses, syllabi, grading of exams, papers, selection of dissertation topics, promotion and tenure, though these assessments often hurt women and minorities because of their tendency to use traditional understandings of what is valuable in academic speech. Courts see the first amendment as supporting judicial review of university content-based speech assessments only when those assessments take

the form of explicit codes protecting new entrants, women and minorities, from unspoken understandings of tolerable behavior within these communities. This combination of decisions suggests that judges are no more likely than other mortals to make decisions free of class, race, and sex bias. [*1046]

The second set of justifications views binding judicial review as fostering democracy in some sense, either by promoting the inclusion of marginal groups or by holding to "We the people's" understanding at a constitutional moment . But judicial review does neither of these things in the context of university regulation of speech. Binding judicial review of university content-based assessments of speech only when the assessments protect women and racial minorities does not promote, in any way, real democracy. Harassment and verbal abuse is part of the system keeping these groups, a majority of the population, in second-class status. Binding judicial review of this nature is more likely to retard democracy.

At no constitutional moment, even in Ackerman's schema, even if we ignore the exclusion of women and minorities, did "We, the people" in any sense approve of the exceedingly intrusive judicial review we see in speech cases today, including binding review even of regulations by states or local entities (not mentioned at all in the first amendment) such as public (state, not federal) universities. This sweeping review of state and local regulation of speech developed only after the last constitutional moment. n242

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n242. See supra text accompanying note 194.

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Furthermore, tolerance of sexist and racist speech are likely to be inconsistent with increasing inclusion of women and racial minorities in university communities; tolerance of sexual and racial harassment and abuse may well lead to escalating harassment and abuse, rather than to a more tolerant society. As other commentators have pointed out, tolerance of racist speech has often coexisted-as during the McCarthy era-with high levels of suppression of political speech. n243 Tolerance of racist Nazi speech in Weimar Germany led to escalating racism and holocaust, not tolerance. We do not yet know what sorts of policies are most likely to lead to real inclusion of women and minorities in university communities.

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n243. See Nagel, supra note 57; Delgado & Stefancic, supra note 27.

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The university speech cases provide a striking illustration of the tendency of binding federal judicial review of speech claims to support the status quo. Universities routinely regulate speech for content and viewpoint in countless ways; that is their purpose and they would otherwise be no more valuable than empty lots with soap boxes. Yet only when university regulation of speech protects new entrants do judges see that universities regulate speech. To only see regulation in such codes is to protect the status quo and traditional norms. [*1047]

Analysis of the countermajoritarian difficulty and of the justifications for judicial review tend to take place at a high level of abstraction. When they are considered in the context of the specific issue of university speech, the case for judicial review becomes quite tenuous and the ambiguities (maybe it helps, maybe it hurts) disappear.

A careful analysis of judicial review of public university regulation speech suggests an additional problem with the evolving ban on viewpoint discrimination by government. Mere mortals cannot actually see viewpoint discrimination whenever it occurs; what looks like reality will not seem a matter of viewpoint. What looks new and different is likely to stand out against background expectations and understandings and look like viewpoint. A ban on viewpoint regulation is, therefore, likely to be extremely conservative when enforced by federal judges.

Conclusion

Women are a majority group who were excluded from the country's founding. Women had no hand in shaping the Constitution, the Bill of Rights, or binding judicial review. In this article, I have argued that such review cannot be legitimate if, in fact, it contributes to women's continuing subordinate status, despite their presence as a majority group. I have considered binding judicial review in three general areas: free speech, sex equality, and abortion. Although any judgment is necessarily speculative in assessing these complex issues, I have suggested that, with the possible exception of abortion (which is too close to call), it is likely that binding judicial review in these areas has hurt women.

I have identified four major problems with binding judicial review from the perspective of women. First, judicial bias is a major problem given the overwhelmingly male makeup of the judiciary. Second, binding judicial review precludes needed experimentation, necessary if we are to be able even to discover what equality between the sexes might mean or what sorts of legal rules might foster it either in equality cases or speech cases.

Third, binding judicial review interferes with quality democratic deliberations in a number of ways. It can legitimate the status quo without requiring much real change, keep important issues off the agenda of ordinary politics, and interfere with political movements, by lowering the pressure for change enough to make long-term significant change unlikely. [*1048]

Fourth, and last, there is the problem of futility, including perverse adaptation: the courts are not institutionally capable of producing real social change, such as equality between the sexes, though they are capable of taking the steam out of a political movement for change by granting trivial victories. Looked at with a critical eye, even the "good" cases-the sex equality and abortion cases-seem of questionable utility to women. And analysis of the speech code cases reveal more specific problems with binding judicial review. Judges cannot see viewpoint discrimination when women and minorities are excluded from, or silenced in, university communities in traditional ways, though they have no difficulty seeing viewpoint discrimination in new speech codes protecting women, minorities, and other newcomers to university communities.

The speech code cases suggest that binding judicial review is a problem for racial minorities as well as for women. This reinforces the suspicions voiced

in the introduction. Perhaps, in general, binding judicial review does not protect racial minorities from the tyranny of the majority very well. And even if judicial review for race discrimination is a net plus for racial minorities considered alone, binding judicial review may be a negative when the costs to minorities of being unable to regulate racist speech are balanced against it. The case for judicial review of free speech and equal protection is, taking both together, tenuous at best, though to be sure, we could have different levels of review for race distinctions and speech.

With sex, the case is, I believe, even more tenuous. We certainly do not know what a world with sex equality would look like nor do we know how to get there. The decisions to date dealing with sex discrimination are quite mixed: a number of trivial wins for women, an even larger number of wins for men, and some important losses: both cases in which rules women need in our imperfect world were struck and cases in which the Court allowed serious discrimination to stand. Yet, by purporting to eliminate sex discrimination, the Court weakened women's incentive to get involved themselves in politics from the grass up, thus lessening the chance that women themselves would be able to protect their own interests through the use of their majority political status.

Abortion-judicial review in the context of a fundamental right-might seem to be women's most unambiguous win, but even that assessment may be optimistic. Roe v. Wade also deflected women's attention form their own political involvement and encouraged them to rely instead on the federal judiciary for protection. And the [*1049] narrow reliance on the judiciary's assurance of abortion rights weakened the political coalition women could have formed across race and class to push legislatively an agenda that would give all women adequate supports and health care in order to have desired children as well as the ability not to have unwanted children. Moreover, the combination of Roe v. Wade and subsequent, more conservative, decisions limiting the right to abortion for poor and teenage women produced a situation in the women with the most political clout had the least incentive to try to change the system and fractured women's coalition across age and wealth.

Perhaps judicial review is harmful to women (or minorities) only in one or some areas I have considered and not other areas, particularly areas I have ignored. If so, then we should seriously consider the legitimacy of continued judicial review in the troubling areas, independent of whether judicial review in other areas is good for women (or minorities). We do not, after all, have the same kind of judicial review for all constitutional provisions. n244 If, for example, judicial review of restrictions on speech tend to hurt women and racial minorities by supporting the power of a minority group (white men), then-regardless of the legitimacy of judicial review in other contexts-judicial review in speech cases would be illegitimate.

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n244. Calabresi, supra note 1.

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Genuine democracy is not likely to occur by accident. Perhaps, like those radical democrats the Athenians, we should regard as essential to democracy the elimination of hubris, which originally meant dishonoring and shaming the victim for one's own pleasure and gratification. n245 Such actions, whether through

speech or conduct, are inconsistent with democracy. Thus, university speech codes-and other regulations of racist and sexist speech-might be necessary prerequisites for a working democracy and for a marketplace in which all are able to speak.

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n245. See David Cohen, Law, Sexuality, and Society 178 (1991); see also Robin West, Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision, 46 U. Pitt. L. Rev. 673 (1985); West, supra note 91.

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As this suggests, the legitimacy problem can, I think, be turned into an argument for certain substantive outcomes, for some interpretations of the free speech and equality provisions rather than others. Judges should defer to sex-based legislative classifications that protect women fulfilling traditional roles. It is true that protection inevitably reinforces traditional stereotypes. But given the ubiquitous problem of judicial bias, experimentation with such ap [*1050] proaches may be necessary if we are ever to see equality between the sexes.

In university settings, judges should be hesitant about extending judicial review into a new area like university speech in light of the conservative and skewed nature of their review. And judges should be more tolerant of viewpoint-restrictions which help groups who have less than their share of political power, particularly when those groups were excluded from the Constitution-making process. In contrast, judges should be most tolerant of viewpoint restrictions which limit the speech of groups with more than their share of political power, particularly when such groups dominated the Constitution-making process.

Differentiating between groups in this sort of way will feel odd, uncomfortable, even illegitimate to federal judges. But unless such distinctions are made, any formal guarantee, such as contemporary free speech, will end up conservative and hence anti-democratic. Binding judicial review of any such constitutional right, resulting in this sort of conservative slant, is illegitimate, I have argued, from the perspective of women: a majority group who had no part in shaping the system of binding judicial review and too little part shaping any right. We seem to have only three choices: (1) learning to make distinctions based on a history of exclusion and contemporary differentials in power; (2) living under a profoundly illegitimate system; or (3) abandoning binding judicial review for sex-based classifications and speech. I prefer the last of these alternatives. From the perspective of women, it would be best to eliminate entirely binding judicial review in speech and sex-equality cases. But if that option is unavailable, then we must choose between illegitimacy and beginning to learn to draw difficult distinctions in terms of power.

LEVEL 1 - 31 OF 96 ITEMS

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ARTICLE AND RESPONSES: THE IDEA OF A USEABLE PAST

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SUMMARY:
... When historians write about historical issues associated with the American Constitution, what is their goal? What are they trying to do? At one stage the answer was simple: Offer an accurate description of the facts. ... It may or may not be a part of the historian's approach to constitutional history, depending on the particular historian's conception of the historian's role. ... My own interest in constitutional history has largely stemmed from an effort to re-evaluate two understandings common in the last generation: that the Framers were principally or exclusively concerned with the protection of preexisting private rights (the so-called Lockean account), or that they sought instead to set out the terms for interest-group struggle (the so-called pluralist account). ... Republicanism, thus understood, does not stand opposed to liberalism, and indeed the opposition between republicanism and liberalism has been quite damaging to the academic study of law (and to the profession of history as well). ... I think that it also helps explain why the constitu tional lawyer's conception of republicanism need not entirely track that of the historian. ... This is an important and complex issue, and it is good to see the issue raised at the level of both historical understanding and constitutional theory. ... No eighteenth-century American or British republican opposed rights, or saw the slightest tension between his commitment to republicanism and his commitment to rights. ...

TEXT:
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When historians write about historical issues associated with the American Constitution, what is their goal? What are they trying to do? At one stage the answer was simple: Offer an accurate description of the facts. If it turns out that the Framers were good democrats attempting to discipline potentially evil representatives by reference to the will of the assembled people, the historian should simply announce that (happy) fact. If, on the other hand, the facts show that the Framers were manipulative, self-interested aristocrats seeking to limit the power of the public, the historian's job is to say so.

It is now much disputed whether and to what extent this conception of the historian's role can be sustained. n1 Of course there is no view from nowhere;

of course we all stand somewhere. Perhaps any historical account, offered by someone in a particular time and place, will reflect current preoccupations and potentially controversial assumptions. To say the least, it is hard to avoid forms of selectivity in dealing with the past. This possibility should certainly not be read for more than it is worth. n2 No one ought to doubt that nations, including the United States, have had a past; no one should doubt that there are really facts to which any historical account must attempt to conform. But human beings see history through their own filters, including their own assumptions, and the result is, inevitably, something other than unmediated access to what happened before. Whether this is a serious obstacle to the traditional understanding of the historian's task is a large and disputed question.

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n1. See Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession 117 (1988).

n2. See Joyce Appleby et al., Telling the Truth About History (1994); Gordon S. Wood, The Losable Past, The New Republic, Nov. 7, 1994, at 46 (book review). On similar issues in philosophy, involving the consequences of critiques of metaphysical realism, see Hilary Putnam, Renewing Philosophy 180200 (1992).

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The traditional constitutional lawyer n3 tends to view the historian's role in pretty conventional terms, as a search for "the facts." n4 Often historians have been sharply critical of constitutional history as done by constitutional lawyers; when they are, they tend to see the constitutional lawyer as an advocate, or as a debased historian, mining the past for insights [*602] congenial to the lawyer's political convictions. n5 One of my prime purposes here is to respond to historians who think of the historically-inclined constitutional lawyer in these terms. What I want to suggest is that the historian and the constitutional lawyer have legitimately different roles. The constitutional lawyer interested in history need not be a politically motivated scavenger of real historical work, but a different sort of creature altogether, with a special and not dishonorable function.

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n3. By this term I mean to refer not only to judges and lawyers involved in constitutional law, but also to academic lawyers involved in constitutional argument.

n4. Martin Flaherty seems not to be an exception, especially insofar as he challenges historical writing for being untrue to the facts or selective about them. See Martin S. Flaherty, History "Lite" in Modern American Constitutionalism, 95 Colum. L. Rev. 523, 55253 (1995).

n5. See Flaherty, supra note 4; Daniel T. Rodgers, Republicanism: The Career of a Concept, 79 J. Am. Hist. 11, 33 (1992); G. Edward White, Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy, 6 Yale J.L. & Human. 1 (1994).

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In short, the constitutional lawyer thinking about constitutional history has a particular purpose and a recognizable project, and what a constitutional lawyer finds from history may, for legitimate reasons relating to that purpose and that role, be quite different from what a historian finds there. This does not reduce the constitutional lawyer to a mere advocate. But it does mean that the function of the constitutional lawyer, even if historically inclined, is properly and unembarrassingly distinctive.

Nothing in what I have said, or will say, denies that the constitutional lawyer owes certain duties of fidelity to the past. The constitutional lawyer should not claim that the history supports a particular view when it does not. The history can falsify much of what the constitutional lawyer might seek to say, at least if the constitutional lawyer genuinely cares about history. History imposes constraints on the lawyer as well as the historian.

If they are reflective, however, many constitutional lawyers will happily acknowledge that they see their task not as uncovering the "facts," and not as simply describing what happened, but instead as interpretive in something like Ronald Dworkin's sense of that term. n6 On this view, constitutional lawyers, unlike ordinary historians, should attempt to make the best constructive sense out of historical events associated with the Constitution. They do owe a duty of "fit" to the materials; n7 they cannot disregard the actual events, which therefore discipline their accounts. But they also try to conceive of the materials in a way that makes political or moral sense, rather than nonsense, out of them to current generations.

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n6. See Ronald Dworkin, Law's Empire 4955 (1986) (describing interpretive nature of law). Dworkin is not, however, speaking of the use of history, and on Dworkin's view of constitutional law, the history behind a provision appears to be barely relevant. I do not mean to endorse Dworkin's view of constitutional interpretation; see Cass R. Sunstein, Incompletely Theorized Agreements, Harv. L. Rev. (forthcoming 1995); Cass R. Sunstein, Legal Reasoning and Political Conflict ch. 3 (1994) (unpublished manuscript, on file with author).

n7. See Flaherty, supra note 4, at 58081.

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Everyone can see that the political or moral commitments of the constitutional lawyer are an omnipresent part of the constitutional lawyer's constitutional history. n8 Why is this? Is it an embarrassment, or does [*603] it reveal something disturbing or untoward? I do not think so. Political or moral commitments play a role because of the interpretive nature of the lawyer's enterprise, which involves showing how the history might be put to present use. I think that this interpretive enterprise is typified, for example, in Bruce Ackerman's work, though Ackerman often writes as if he were simply describing the facts. n9 I also think that this interpretive enterprise is far from mere advocacy. The distinction requires more elaborate treatment than I can offer here. For the moment, let me simply suggest that the true advocate begins with a preestablished conclusion, is interested only in persuasion, and allows his political convictions to dominate everything that he says, whereas the historically-inclined constitutional lawyer is interested in truth, and owes duties of objectivity and fairness to the materials that he invokes. n10

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n8. As emphasized in White, supra note 5.

n9. See 1 Bruce Ackerman, We the People (1991).

n10. On how the notion of objectivity might be maintained despite the inevitability of a form of selectivity, see Putnam, supra note 2, at 180200.

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With this in mind we come to the idea of a useable past. n11 This idea points to the goal of finding elements in history that can be brought fruitfully to bear on current problems. The search for a useable past is a defining feature of the constitutional lawyer's approach to constitutional history. It may or may not be a part of the historian's approach to constitutional history, depending on the particular historian's conception of the historian's role. The historian may not be concerned with a useable past at all, at least not in any simple sense. Perhaps the historian wants to reveal the closest thing to a full picture of the past, or to stress the worst aspects of a culture's legal tradition; certainly there is nothing wrong with these projects. But constitutional history as set out by the constitutional lawyer, as a participant in the constitutional culture, usually tries to put things in a favorable or appealing light without, however, distorting what actually can be found.

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n11. See Akhil R. Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987).

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Is the constitutional lawyer's approach - as I am describing it here - cynical, or dishonest, or debased, or reflective of a form of "history lite"? The question cannot be answered in the abstract. Sometimes the charge of cynicism, dishonesty, debasement, or "liteness" is entirely warranted. For example, it is familiar to find a constitutional lawyer reading history at a very high level of abstraction ("the Framers were committed to freedom of speech") and concluding that some concrete outcome follows for us ("laws regulating obscenity are unconstitutional"). This use of history is not honorable. It is a bad version of formalism - the pretense that concrete cases can be resolved by reference to general propositions, when in fact some supplemental value judgments are required. n12

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n12. An honorable species of formalism is defended in Frederick Schauer, Playing By the Rules 22933 (1991); this species of formalism calls for adherence to the literal text of legal materials.

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Moreover, constitutional lawyers, preoccupied with the idea of a useable past, may draw from history a lesson that comes pretty much entirely from their own political commitments, and not at all from the history itself. Certainly this is true of some of Robert Bork's use of history. n13 Bork's particular understanding of the so-called Madisonian dilemma would not be appealing to Madison; consider Bork's suggestion, which Madison would not find even plausible, that "majorities are entitled to rule, if they wish, simply because they are majorities." n14 Some of John Hart Ely's use of history - to support a "process-perfecting" conception of judicial review - probably belongs in this category as well. n15

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n13. See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971); see also Robert H. Bork, The Tempting of America (1990) [hereinafter Bork, The Tempting of America].

n14. Bork, The Tempting of America, supra note 13, at 139.

n15. See John H. Ely, Democracy and Distrust 77101 (1980).

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On the other hand, constitutional lawyers should not argue that the Constitution requires whatever they think a good constitution would say, and as a way of disciplining legal judgment, constitutional lawyers should look to history as a part of constitutional interpretation. Hence there is nothing at all dishonorable in the idea that constitutional lawyers should try to identify those features of the constitutional past that are, in their view, especially suitable for present constitutional use. The American constitutional culture gives special weight to the convictions of those who ratified constitutional provisions, and though I cannot fully defend the claim here, I believe that this interpretive practice is legitimate. Constitutional law is based on ideas about authority, not just on ideas about the good or the right. Constitutional history n16 provides a way of constraining legal judgments, invoking a set of provisions with at least some kind of democratic pedigree, and providing a shared set of materials from which judicial reasoning can proceed. n17

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n16. In this regard Flaherty rightly points to the importance of consulting the primary sources, and of understanding the best and most recent work by historians. See Flaherty, supra note 4, at 55356.

n17. See David A. Strauss, Common Law Constitutional Interpretation (1994) (unpublished manuscript, on file with Columbia Law Review). Of course there remains the question of deciding at what level of generality the history is to be read. If read at a high level, the history could authorize any decision at all; if read at a very low level, the result would probably be useless for current problems. It follows that some kind of intermediate course will make best sense, though I can hardly discuss this complex issue - the issue of "how to read" the past for constitutional purposes - in this space. Doubts about the possibility of the historical enterprise - how can we know what long-dead people really meant? how can we possibly reconstruct their world? - seem to me overstated in principle; but whether or not they are overstated, such doubts

are hard for the constitutional lawyer to entertain. For better or for worse, the lawyer participates in a culture in which historical arguments are important, and it is therefore unhelpful to throw up one's hands.

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Nothing in these remarks is inconsistent with the proposition that much in our constitutional history is bad and no longer useable. Some aspects of constitutional history that are of considerable importance to [*605] constitutional historians may not be so useful for constitutional lawyers. Slavery was of course accepted in the Founding period; the Framers' conception of free speech was almost certainly much narrower than anyone would find reasonable today; the Framers' conception of equality would permit forms of discrimination that the Supreme Court would unanimously condemn. It is undoubtedly worthwhile for people to explore old and sometimes unacceptable understandings for purposes of grasping our own constitutional past.

What I am suggesting is that the constitutional lawyer, thinking about the future course of constitutional law, has a special project in mind, and that there is nothing wrong with that project. n18 The historian is trying to reimagine the past, necessarily from a present-day standpoint, but subject to the discipline provided by the sources and by the interpretive conventions in the relevant communities of historians. By contrast, the constitutional lawyer is trying to contribute to the legal culture's repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future. On this view, the historically-minded lawyer need not be thought to be doing a second-rate or debased version of what the professional historians do well, but is working in a quite different tradition with overlapping but distinct criteria.

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n18. I am very grateful to Richard Ross for helpful discussion of the thoughts in this paragraph.

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My own interest in constitutional history n19 has largely stemmed from an effort to re-evaluate two understandings common in the last generation: that the Framers were principally or exclusively concerned with the protection of preexisting private rights (the so-called Lockean account n20), or that they sought instead to set out the terms for interest-group struggle (the so-called pluralist account n21). These understandings are quite inadequate. n22 The Framers were republicans, and they were republicans in the distinctive sense that they prized civic virtue and sought to promote deliberation in government - deliberation oriented toward right answers about the collective good. We cannot understand our constitutional heritage without resort to these points.

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n19. See Cass R. Sunstein, The Partial Constitution 1739, 12361 (1993); Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985). Historical claims also play a central role in Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1 (1994).

n20. See Louis Hartz, The Liberal Tradition in America 320 (Harcourt Brace Jovanovich 1991) (1955).

n21. See Robert A. Dahl, A Preface to Democratic Theory 432 (1963).

n22. The best demonstrations are Gordon S. Wood, The Creation of the American Republic: 17761787 (1969); Gordon S. Wood, The Radicalism of the American Revolution (1992).

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Republicanism, thus understood, does not stand opposed to liberalism, and indeed the opposition between republicanism and liberalism [*606] has been quite damaging to the academic study of law (and to the profession of history as well). n23 But republicanism is sharply opposed to interest-group pictures of governance. It favors instead a conception of deliberative democracy. For constitutional lawyers as well as historians, this is a matter of considerable importance. It bears on how we think about the Founding document and it also relates to, though it certainly does not resolve, a range of concrete constitutional controversies.

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n23. Liberalism and republicanism are opposed, for example, in White, supra note 5, and Rodgers, supra note 5. Rodgers in particular identifies liberalism with an "inability to imagine politics as anything other than interest group pluralism," and as committed to "procedural neutrality." These understandings of liberalism, found in much historical work, are extremely odd, and based at most on certain strands in liberalism. Those strands should hardly be identified with the liberal tradition itself. Mill, Rawls, and Raz, for example, thoroughly reject these ideas, and reject them because of their understanding of what liberalism entails. See John Stuart Mill, Considerations on Representative Government (Gateway Editions 1962) (1861); John Rawls, A Theory of Justice (1971); Joseph Raz, The Morality of Freedom (1986).

To say this is not to deny that some republicans emphasized some goals that some liberals tend to view skeptically. Some liberals, for example, emphasize the likely role of self-interest in politics, whereas some republicans stress pre-modern ideas involving corruption in government and the concept of "virtue." See White, supra note 5, at 7. But these differences of emphasis should not be taken to suggest that the liberal and republican traditions are at war or even distinguishable. Better antonyms to republicanism are interest-group pluralism and conceptions of politics that see protection of private rights as the sole purpose of constitutional structure.

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Of course the republican tradition, in some of its incarnations, has been associated with unappealing and unusable ideals - exclusion of women, militarism, lack of respect for competing conceptions of the good, and more. But the commitment to deliberative democracy is not logically connected with those unappealing ideals; indeed, as an abstraction it is in considerable tension with them. Constitutional lawyers who are interested in republicanism need not be embarrassed by its contingent historical connection with unjust practices. Nearly all traditions, and nearly all expositors of traditions, can be shown